(2) Supreme Court, U.S.
FILED

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OFFICE

No. ____

In the Supreme Court of the United States

October Term, 2000

BOISE CASCADE CORPORATION, a Delaware corporation,

Petitioner,

v.

STATE OF OREGON,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE OREGON COURT OF APPEALS

APPENDIX TO PETITION FOR WRIT OF CERTIORARI VOLUME I

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January 25, 2001

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TABLE OF APPENDICES

Appendix	Document
A	*Boise Cascade Corp. v. State ex rel. Oregon State Board of Forestry*, 991 P.2d 563 (Or. App. 1999).
B	Order of Oregon Court of Appeals dated March 15, 2000, in *Boise Cascade Corp. v. Board of Forestry* (CA A100855), denying reconsideration of its prior decision reported at 991 P.2d 563.
C	Order of the Oregon Supreme Court dated October 24, 2000, in *Boise Cascade Corp. v. Board of Forestry*, ___ P.2d ___ (SC S47459), denying petition for review.
D	Letter Opinion dated October 16, 1997, of the Clatsop County Circuit Court (No. 93-2018) denying Petitioner summary judgment on its possessory takings claim, and granting summary judgment on the issue of liability on Petitioner's regulatory takings claim.
E	Jury Verdict dated November 21, 1997, in *Boise Cascade Corp. v. Board of Forestry* (Clatsop County Circuit Court No. 93-2018), finding the State liable on Petitioner's *Loretto* claim and making findings on the compensation issues.
F	Judgment of the Clatsop County Circuit Court in *Boise Cascade Corp. v. Board of Forestry*, No. 93-2018, entered on April 30, 1993.
G	*Boise Cascade Corp. v. Board of Forestry*, 886 P.2d 1033 (Or. App. 1994).

H — *Boise Cascade Corp. v. Board of Forestry*, 935 P.2d 411 (Or. 1997).

I — Appellate Judgment in *Boise Cascade Corp. v. Board of Forestry*, (CA A78968, A79458, SC S47459), entered on December 15, 2000.

J — Oregon Administrative Rule 629-665-0210 (2000), formerly numbered 629-024-0809.

K — Oregon Administrative Rule 629-680-000 (2000), formerly numbered 629-056-0010.

L — Oregon Administrative Rule 629-680-0010(5) (2000), formerly numbered 629-056-0020(5).

M — Oregon Administrative Rule 629-680-0100(1) (2000), formerly numbered 629-056-0100(1).

N — Oregon Administrative Rule 629-680-0220 (2000), formerly numbered 629-056-0220.

O — USF&WS *Procedures Leading to Endangered Species Act Compliance for the Northern Spotted Owl* ("Guidelines"), dated July 1990.

P — USF&WS Memorandum issued October 2, 1991, rescinding Guidelines.

Q — Memorandum Order of the U.S. District Court for the District of Columbia dated February 27, 1992, regarding USF&WS's recission of the Guidelines.

R — Final Order of Bureau of Forestry ("BOF") dated January 19, 1993, affirming the State Forester's denial of Boise Cascade's amended plan for timber harvest.

S — Letter dated October 15, 1997, from the Oregon Department of Forestry to counsel for Boise Cascade.

T — Judgment entered by Clatsop County Circuit Court on December 24, 1997, in favor of Boise Cascade in the amount of $1,820,059, plus prejudgment interest.

U — Letter from the BOF's counsel to the USF&WS dated June 16, 1992, and cited in the BOF's Final Order (App. R) as indicating that Oregon law would not be satisfied if the USF&WS were to issue a decision finding that an Incidental Take Permit ("ITP") under the Endangered Species Act was not required.

V — Order of Oregon Court of Appeals in *Boise Cascade Corp. v. Board of Forestry* (CA A100855) dated January 6, 2000, granting in part Boise Cascade's Motion for Reconsideration.

W — Injunction Order dated July 28, 1997, in *United States v. Coast Forest Res. Ltd. P'ship*, U.S.D.C. Or. Civil No. 96-1575-HO, 2000 WL 298707 enjoining another timber owner because there was a spotted owl activity center approximately one mile away from the harvest site.

X — Complaint filed in *State of Oregon v. Int'l Paper Co.*, U.S.D.C. Or. Civil No. 93-6223-HO, dated July 1993.

Y — Letter dated December 10, 1997, from the federal government to counsel for Boise Cascade suggesting that Petitioner should apply for an ITP.

Z — Decree and Judgment entered on October 15, 1998, by the United States District Court for the District of Oregon in *Boise Cascade Corporation v. Michael J. Spear*, No. 97-1810-JO, granting the federal government an injunction prohibiting Petitioner from cutting any trees on its property unless it first obtained an ITP.

AA — Letter from the federal government's counsel to Boise Cascade dated July 30, 1999, concluding that the site had been abandoned by the owls, and notifying Boise Cascade that the government would not oppose dissolving the existing injunction.

991 P.2d 563 (Or.App. 1999)

BOISE CASCADE CORPORATION, a Delaware corporation, Respondent,

v.

STATE OF Oregon, By and Through the OREGON STATE BOARD OF FORESTRY, Appellant.

(93-2018; CA A100855)

Court of Appeals of Oregon

Appeal After Remand from Circuit Court,
Clatsop County
Paula J. Brownhill, Judge

Argued and Submitted Feb. 22, 1999.

Decided Nov. 10, 1999.

John T. Bagg, Assistant Attorney General, argued the cause for appellant. With him on the briefs were Hardy Myers, Attorney General, and Michael D. Reynolds, Solicitor General.

Phillip D. Chadsey, Boise, ID, argued the cause for respondent. With him on the brief were Charles F. Adams and Stoel Rives LLP.

Daniel Kearns, Portland, Reeve Kearns PC, and John D. Echeverria, San Francisco, CA, filed a brief amicus curiae for Audubon Society of Portland.

Brent D. Boger, Robin L. Rivett, and Eric Grant, Sacramento, CA, filed a brief amicus curiae for Pacific Legal

Foundation, Oregon Farm Bureau, and California Farm Bureau Federation.

Before De MUNIZ, Presiding Judge, and DEITS, Chief Judge, and ARMSTRONG, Judge.

De MUNIZ, P.J.

The state appeals from a jury verdict in favor of plaintiff Boise Cascade (Boise) on its claim for a temporary taking of a stand of timber in which a pair of northern spotted owls were nesting. For the following reasons, we reverse and remand.

In 1988, Boise acquired 1,770 acres of commercial timberlands in Clatsop County and conducted some logging activities on its property. Also in 1988, the Oregon Department of Fish and Wildlife designated the northern spotted owl as a threatened species. In 1990, the State Forester adopted an administrative policy precluding timber harvesting within a 70-acre area around known spotted owl nesting sites, ultimately codified as *former* OAR 629-24-809.[1] In 1991, Boise sold all of

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[1] *Former* OAR 629-24-809 provided, in part:

"(1) Whenever the State Forester determines that an operation will conflict with protection of a nesting site of the northern spotted owl * * *, the operator must obtain the State Forester's approval of a written plan before commencing the operation. The written plan, at a minimum, must address how the operation will be conducted to provide for the following:

"(a) A 70-acre area of suitable spotted owl habitat encompassing the nest site, to be maintained as suitable spotted owl habitat[.]"

A substantially similar rule is currently found at OAR 629-665-0210.

those commercial timberlands except for a 64-acre parcel (the Walker Creek site), which the buyer refused to accept due to the presence of a northern spotted owls' nest on the site. The present dispute centers around the state's refusal to permit logging on the Walker Creek site during the period that the spotted owls were nesting there.

A spotted owl had been seen on the Walker Creek site in 1986, and a pair of spotted owls nested on the site in 1990, hatching two offspring. Another spotted owl was seen on the site in 1991. A breeding pair was present on the site in 1992. In early 1992, Boise sought approval from the State Forester of its plan to harvest the timber on the site. The State Forester did not approve Boise's harvesting plan because the plan did not identify for protection 70 acres of suitable spotted owl habitat encompassing the nesting site at Walker Creek. The Board of Forestry upheld the denial of Boise's plan on the ground that the proposed plan failed to comply with *former* OAR 629-24-809. A subsequent plan permitted Boise to log several acres of the Walker Creek site but only during time frames when no owls were nesting on the site.

Boise initiated this action for inverse condemnation, arguing that the refusal to permit it to log the Walker Creek site constituted a taking under Article I, section 18, of the Oregon Constitution, as well as under the Fifth Amendment, as applied to the states through the Fourteenth Amendment, of the United States Constitution. Boise further alleged that the restriction on logging the other acres during the owl nesting season was a temporary taking under both constitutions. The trial court dismissed the complaint. On appeal, we reversed, *Boise Cascade Corp. v. Board of Forestry*, 131 Or.App. 538, 886 P.2d 1033 (1994), and the Supreme Court allowed review. On review, the Supreme Court affirmed in part and reversed in part, concluding that, although Boise failed to state a claim for a temporary taking of the small amount of timber that the Board of

Forestry permitted to be logged, Boise did state a claim for a taking of the remainder of the Walker Creek site. *Boise Cascade Corp. v. Board of Forestry*, 325 Or. 185, 935 P.2d 411 (1997).[2]

On remand, Boise dropped its claim under the Oregon Constitution and proceeded only on its federal constitutional claim. Boise moved for partial summary judgment, and the trial court ruled as a matter of law that a regulatory taking had occurred. The question of damages was tried to a jury, as was a question as to whether a taking by "physical invasion" had occurred. Meanwhile, one of the spotted owls on the Walker Creek site had died and the other had left the site, and all restrictions on logging the site were lifted. The jury returned a verdict for Boise, and the trial court entered judgment for Boise in the amount of $2,279,223 in damages for the temporary restriction on its logging of the Walker Creek site. This appeal ensued.

On appeal, the state makes numerous arguments that the trial court erred in failing to dismiss the claim, in granting partial summary judgment, in limiting the state's evidence, in instructing the jury, and in various other regards. We turn first to the state's argument that the trial court lacked jurisdiction by reason of the Eleventh Amendment to the United States Constitution.

The state argues that there is no direct right of action under the Fifth and Fourteenth Amendments to the United States Constitution against the state in a state court. The state maintains that, although Congress can, and has, abrogated the states' immunity from suit by way of its power to enforce the Fourteenth Amendment, Boise has not pleaded its case under any statute that abrogates the state's immunity, *e.g.*, 42 USC section

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[2] The court's decision covered other subjects as well, but they are not pertinent to this appeal.

1983. Although the state acknowledges that a number of takings claims under the federal constitution have proceeded in Oregon courts throughout the years, it argues that the sovereign immunity question was not raised and thus was not addressed in those cases.

Boise responds that, although the Eleventh Amendment may bar plaintiffs from pursuing federal constitutional claims against states in federal court, it "has nothing to do with barring a plaintiff from bringing a takings claim against the State, based on the federal constitution, in the Oregon courts[.]" Until quite recently, Boise's position on this question seemed unassailable. *See, e.g., Hilton v. South Carolina Public Railways Com'n*, 502 U.S. 197, 204-05, 112 S.Ct. 560, 116 L.Ed.2d 560 (1991) ("But as we have stated on many occasions, 'the Eleventh Amendment does not apply in state courts.'"). However, in a recent series of cases, the United States Supreme Court has significantly altered its position on the question of states' sovereign immunity. Most directly on point is *Alden v. Maine*, 527 U.S. 706, 119 S.Ct. 2240, 144 L.Ed.2d 636 (1999), which concerned an attempt by state employees to enforce the Fair Labor Standards Act (FLSA), 29 USC section 201 et seq., against the state in a state court proceeding. Although the FLSA contains a provision purporting to authorize actions against states in their own courts, the Court held that "the powers delegated to Congress under Article I of the United States Constitution do not include the power to subject nonconsenting States to private suits for damages in state courts." 119 S.Ct. at 2246.

The Court first acknowledged that the text of the Eleventh Amendment does not actually address the question of when a state may be sued in its own courts.[3] *Id.* However, after

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[3] The Eleventh Amendment to the United States Constitution provides:

reviewing at length the history of the Tenth and Eleventh Amendments, and its own earlier case law upholding the states' "sovereign immunity in various contexts falling outside the literal text of the Eleventh Amendment," *id.* at 2253, the Court concluded that basing decisions concerning states' immunity on the text of the amendment alone would constitute "ahistorical literalism[.]" *Id.* at 2254. Although acknowledging Congress's power to enact legislation such as the FLSA via the Commerce Clause, the Court concluded that Congress did not have the power to abrogate states' sovereign immunity in doing so. *Id.*

The Court went on to indicate, though, that sovereign immunity would "not bar all judicial review of state compliance with the Constitution[.]" *Id.* at 2266. In particular, the Court pointed out:

> "We have held also that in adopting the Fourteenth Amendment, the people required the States to surrender a portion of the sovereignty that had been preserved to them by the original Constitution, so that Congress may authorize private suits against nonconsenting States pursuant to its § 5 enforcement power. *Fitzpatrick v. Bitzer*, 427 U.S. 445[, 96 S.Ct. 2666, 49 L.Ed.2d 614] (1976). By imposing explicit limits on the powers of the States and granting Congress the power to enforce them, the Amendment 'fundamentally altered the balance of state and federal power struck by the Constitution.' *Seminole Tribe [of*

"The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

> *Fla. v. Florida*, 517 U.S. 44, 59, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996)]. When Congress enacts appropriate legislation to enforce this Amendment, *see City of Boerne v. Flores*, 521 U.S. 507[, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997)], federal interests are paramount, and Congress may assert an authority over the States which would be otherwise unauthorized by the Constitution. *Fitzpatrick, supra*, at 456 [96 S.Ct. 2666]." *Alden*, 119 S.Ct. at 2267.

In summary, the Court has declared that, even if a state has not waived its sovereign immunity, Congress may, pursuant to the enforcement power granted it by section 5, of the Fourteenth Amendment,[4] enact legislation to enforce constitutional rights that have been made applicable to the states through the Fourteenth Amendment. It is not disputed that the just compensation clause of the Fifth Amendment applies to the states through the Fourteenth Amendment. The question, then, is whether plaintiff's only remedy for the constitutional violation it alleges is through a positive enactment of Congress, such as 42 USC section 1983, as the state posits.

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[4] The Fourteenth Amendment to the United States Constitution provides, in part:

> "Section 1. * * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> " * * * * *
>
> "Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

The parties cite no provision other than 42 USC section 1983 as an affirmative act of Congress that would abrogate the states' sovereign immunity and subject it to takings claims in state courts, and we are aware of none.[5] However, we do not find the state's answer to this issue--that plaintiff failed to state a claim because it did not proceed under 42 USC section 1983--to be satisfactory. Section 1983 actions may be brought against "persons," but a state is not a "person" for purposes of section 1983. *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 64, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989). As noted above, though, the Fourteenth Amendment provides that no "*state* [shall] deprive any person of * * * property, without due process of law," and the Fifth Amendment, incorporated as to the states through the Fourteenth Amendment, calls for "just compensation" for a taking of property. (Emphasis added.) In short, section 1983 does not provide for the remedy required by the constitution for a taking of property by the *state*.

Thus, the question comes down to whether Boise can maintain an inverse condemnation action against the state in state court, based on an alleged violation of the Fifth Amendment to United States Constitution, in the absence of congressional action pursuant to section five of the Fourteenth Amendment authorizing such an action. As a general matter, the *Alden* decision discussed above might suggest that the answer is "no," because of its emphasis on positive acts of Congress under section five of the Fourteenth Amendment. However, certain language in the *Alden* decision, particularly when read in conjunction with some of the Court's earlier case law describing

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[5] The state concedes that Congress has authority to subject it to suit in state court without its consent. We recognize that *Alden* may well be read to indicate otherwise, but we will treat the state's concession in this case as a partial waiver of any sovereign immunity defense that it is immune from suit in state court even if Congress has the authority to subject it to suit in federal court.

the Fifth Amendment as "self-executing," casts doubt on such a conclusion. In *Alden*, the Court distinguished the issue before it from the issue presented in *Reich v. Collins*, 513 U.S. 106, 115 S.Ct. 547, 130 L.Ed.2d 454 (1994):

> "In *Reich v. Collins*, 513 U.S. 106 [115 S.Ct. 547, 130 L.Ed.2d 454] (1994), we held that, despite its immunity from suit in federal court, a State which holds out what plainly appears to be a 'clear and certain' postdeprivation remedy for taxes collected in violation of federal law may not declare, after disputed taxes have been paid in reliance on this remedy, that the remedy does not in fact exist. *Id.* at 108 [115 S.Ct. 547]. This case arose in the context of tax-refund litigation, where a State may deprive a taxpayer of all other means of challenging the validity of its tax laws by holding out what appears to be a 'clear and certain' postdeprivation remedy. *Ibid.*; *see also Fair Assessment in Real Estate Assn., Inc. v. McNary*, 454 U.S. 100[, 102 S.Ct. 177, 70 L.Ed.2d 271] (1981). *In this context, due process requires the State to provide the remedy it has promised. Cf. Hudson v. Palmer*, 468 U.S. 517, 539[, 104 S.Ct. 3194, 82 L.Ed.2d 393] (1984) (O'Connor, J., concurring). *The obligation arises from the Constitution itself; Reich* does not speak to the power of Congress to subject States to suits in their own courts." *Alden*, 119 S.Ct. at 2259 (emphasis added).

Although Reich has little direct bearing on the issue before us, as it did not involve any issues of sovereign immunity, the Court's description of *Reich* in *Alden* strongly suggests that states may be required to provide promised remedies in state court proceedings by force of the Due Process Clause alone.

Further support for this idea that the Constitution itself may dictate the availability of remedies in state court under

certain circumstances can be found in *First Lutheran Church v. Los Angeles County*, 482 U.S. 304, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987). Although *First Lutheran* did not squarely present the type of sovereign immunity issue with which we are confronted, it provides significant guidance on the issue. In *First Lutheran*, the plaintiff sued a county after it adopted an interim ordinance that temporarily banned construction within a flood zone. 482 U.S. at 307- 08, 107 S.Ct. 2378. The focus of the case was whether a temporary regulatory taking constituted a taking under the Fifth Amendment. It does not appear from the text of the opinion that a sovereign immunity defense was raised. However, the Solicitor General, an *amicus* in the case, did make a sovereign immunity argument that the Court addressed:

> "We have recognized that a landowner is entitled to bring an action in inverse condemnation as a result of 'the self-executing character of the constitutional provision with respect to compensation * * *.' *United States v. Clarke*, 445 U.S. 253, 257, 100 S.Ct. 1127, 63 L.Ed.2d 373 (1980), quoting 6 P. Nichols, *Eminent Domain* § 25.41 (3d rev ed 1972). As noted in Justice Brennan's dissent in *San Diego Gas & Electric Co.*, 450 U.S. [621], 654-55, 101 S.Ct. 1287, 67 L.Ed.2d 551 [(1981)], it has been established at least since *Jacobs v. United States*, 290 U.S. 13, 54 S.Ct. 26, 78 L.Ed. 142 (1933), that claims for just compensation are grounded in the Constitution itself:
>
> > "'The suits were based on the right to recover just compensation for property taken by the United States for public use in the exercise of its power of eminent domain. *That right was guaranteed by the Constitution.* The fact that condemnation proceedings were not instituted and that the right was asserted in suits by the owners did not change the essential nature of the

> claim. The form of the remedy did not qualify the right. It rested upon the Fifth Amendment. Statutory recognition was not necessary. A promise to pay was not necessary. Such a promise was implied because of the duty to pay imposed by the Amendment. *The suits were thus founded upon the Constitution of the United States.*' *Id.* at 16, 54 S.Ct. 26, 78 L.Ed. 142. (Emphasis added [by *First Lutheran* court]).'

"*Jacobs*, moreover, does not stand alone, for the Court has frequently repeated the view that, in the event of a taking, the compensation remedy is required by the Constitution. *See, e.g., Kirby Forest Industries, Inc. v. United States*, 467 U.S. 1, 5, 104 S.Ct. 2187, 81 L.Ed.2d 1 (1984); *United States v. Causby*, 328 U.S. 256, 267, 66 S.Ct. 1062, 90 L.Ed. 1206 (1946); *Seaboard Air Line R. Co. v. United States*, 261 U.S. 299, 304-306, 43 S.Ct. 354, 67 L.Ed. 664 (1923); *Monongahela Navigation [Co. v. United States*, 148 U.S. 312, 13 S.Ct. 622, 37 L.Ed. 463 (1893).[9]

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[9] "The Solicitor General urges that the prohibitory nature of the Fifth Amendment * * * combined with principles of sovereign immunity, establishes that the Amendment itself is only a limitation on the power of Government to act, not a remedial provision. The cases cited in the text, we think, refute the argument of the United States that 'the Constitution does not, of its own force, furnish a basis for a court to award money damages against the government.' Brief for United States as *Amicus Curiae* 14. Though arising in various factual and jurisdictional settings, these cases make clear that it is the Constitution that dictates the remedy for interference with property rights amounting to a taking. *See San Diego Gas & Electric Co. v. San Diego*, 450

U.S. 621, 655 n. 21, 101 S.Ct. 1287, 67 L.Ed.2d 551 (1981) (Brennan, J., dissenting), quoting *United States v. Dickinson*, 331 U.S. 745, 748, 67 S.Ct. 1382, 91 L.Ed. 1789 (1947)." *First Lutheran*, 482 U.S. at 315-16, 316 n. 9, 107 S.Ct. 2378.

Piecing together the Court's various statements in *First Lutheran* with its description of *Reich* in *Alden*, we conclude that the Court, in its recent Eleventh Amendment decisions, did not intend to abandon the notion that at least some constitutional claims are actionable against a state, even without a waiver or congressional abrogation of sovereign immunity, due to the nature of the constitutional provision involved. We recognize that our conclusion on this point is not beyond dispute. *See, e.g., Azul-Pacifico, Inc. v. City of Los Angeles*, 973 F.2d 704, 705 (9th Cir.1992), *cert. den.* 506 U.S. 1081, 113 S.Ct. 1049, 122 L.Ed.2d 357 (1993) (Takings plaintiff had "no cause of action directly under the United States Constitution. We have previously held that a litigant complaining of a violation of a constitutional right must utilize 42 USC 1983[.]"). However, particularly in light of the Court's rejection of the *amicus curiae's* sovereign immunity argument in *First Lutheran*, and in light of the fact that the state has explicitly disavowed any reliance on *Alden* in the present case, we conclude that *Alden* should not be read so broadly as to dictate that states may not be sued in state courts on federal takings claims unless they have specifically waived their sovereign immunity. We conclude that, because of the "self-executing" nature of the Fifth Amendment, as applied to the states through the Fourteenth Amendment, a state may be sued in state court for takings in violation of the federal constitution.

The state next argues that the trial court erred in denying its motion to dismiss for failure to state a claim under either of two theories: the *Lucas* theory (deprivation of all beneficial use of property) and the *Loretto* theory (physical occupation of

property). *See generally Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982). To state a claim under the Fifth Amendment for a taking under a *Lucas* theory, the property owner must allege that a governmental action has deprived the owner of all economically beneficial use of the property. Both this court and the Oregon Supreme Court concluded that plaintiff had stated a claim under this type of theory in the course of the previous appeal. *See Boise Cascade*, 131 Or.App. at 551, 886 P.2d 1033 ("plaintiff alleges, in essence, that the government has regulated its property in such a way that productive uses are unavailable and all viable economic and beneficial use has been eliminated. Those allegations suffice to state regulatory taking claims under * * * *Lucas*"); *Boise Cascade*, 325 Or. at 198, 935 P.2d 411 (Plaintiff's allegations were "sufficient to meet the 'deprivation of all economically viable use of the property' standard. The Court of Appeals was correct in so holding."). Although plaintiff amended its pleadings after remand, the amended pleadings, insofar as the *Lucas* theory of recovery is concerned, are much the same as its pleadings discussed in the previous appellate decisions in this case. Plaintiff alleged that the state has regulated its property in such a way that all viable economic and beneficial use of the property was eliminated. The trial court properly denied the state's motion to dismiss on the ground that plaintiff failed to state a claim under the *Lucas* theory.

The state also moved to strike plaintiff's allegations that it had suffered a *per se* taking by means of a "permanent physical occupation" in violation of the Fifth Amendment. In its complaint, plaintiff alleged that the administrative rules described above required plaintiffs to maintain spotted owl nests and prevent their abandonment so the nests could be occupied annually by a pair of breeding owls and that the state's denial of plaintiff's plan to harvest the timber constituted a *per se* taking.

The *Loretto* case concerned "whether a minor but permanent physical occupation of an owner's property authorized by government constitutes a 'taking' of property for which just compensation is due under the Fifth and Fourteenth Amendments." 458 U.S. at 421, 102 S.Ct. 3164. The state argues that the court erred in denying its motion to strike this count of plaintiff's claim because plaintiff has not alleged the type of physical occupation at issue in *Loretto*. We agree.

In *Loretto*, the challenged statute required landlords to permit cable television companies to install devices on their property. *Id.* There, the Court recounted at length the historic distinctions between takings involving permanent physical invasion of property and regulations that place restrictions on the use of property. 458 U.S. at 427-35, 102 S.Ct. 3164. One of the early physical invasion cases that the Court discussed in *Loretto* was *Pumpelly v. Green Bay Co.*, 80 U.S. (13 Wall) 166, 20 L.Ed. 557 (1871), in which the Court held that "where real estate is actually invaded by *superinduced* additions of water, earth, sand or other material, or by having any *artificial* structure placed on it, so as to effectually destroy or impair its usefulness, it is a taking[.]" (Emphasis added.) *Pumpelly* involved a situation where the government *caused* a party's land to become flooded. However, the Court's "physical occupation" jurisprudence in no way suggests that the same takings analysis would apply where, for example, a natural flood occurred and government regulations pertained to how a landowner was to deal with floodwaters on his or her land. *Compare Pumpelly*, 80 U.S. at 177-78 (where government caused property to flood by constructing a dam, there was a taking by "physical occupation"), *with First Lutheran*, 482 U.S. at 308, 107 S.Ct. 2378 (where flood occurred as a consequence of a forest fire destroying a watershed area, government regulation of construction within flood zone was analyzed under regulatory takings case law).

As the state points out, there are significant differences between a government authorizing or conducting a physical invasion of the property of another and a government regulating what one may do with property due to the random or incidental location of a natural resource or wild animal on the property. The state has no control over where spotted owls choose to nest. The natural occurrence of a pair of breeding spotted owls on a piece of property is more akin to the naturally occurring flood in our hypothetical described above than to a flood caused by the government's construction of a dam, as was the case in *Pumpelly*, or to the installation of an artificial structure such as a cable television box, as was the case in *Loretto*.

The state did not cause or induce the spotted owls to breed on plaintiff's property. The state simply regulated plaintiff's use of the property based on the presence of the spotted owls there. Although plaintiffs have stated a claim for a regulatory taking, they have not stated a claim for a "physical occupation" taking under *Loretto*. The trial court erred in concluding otherwise.

However, that conclusion does not end our inquiry. As noted, plaintiff pleaded two theories in alternative counts as part of its takings claim. Although the court should have stricken the *Loretto* count, it properly denied the state's motion to dismiss the regulatory taking count. As noted above, the trial court granted plaintiff summary judgment on its regulatory taking count and submitted the *Loretto* count to the jury. In response to a separate question, the jury also determined damages, but it is undisputed that the damages under either theory would be the same. Thus, although the submission of plaintiff's *Loretto* theory to the jury was erroneous, the jury's damage award nevertheless was proper if the trial court correctly decided the regulatory taking question. This is not a situation where we cannot tell what theory the jury followed in reaching its conclusion. *Cf. Whinston v. Kaiser Foundation Hosp.*, 309 Or. 350, 357, 788 P.2d 428 (1990)

(where more than one theory is submitted to the jury and some are unsupported by the evidence, but it cannot be determined on which allegation the jury based its verdict, a new trial must be granted). Only one theory of liability was before the jury here, and even though it was not properly before the jury, the damages question, which applied in the same manner to both takings theories, was properly before the jury and would have been properly before the jury even if the trial court had correctly stricken the *Loretto* count from plaintiff's takings claim. We therefore turn to the pleading issues pertaining to the regulatory taking claim.

The state argues that the trial court erred in striking its defense that Boise's proposed logging would constitute a nuisance and that the state cannot be liable for refusing to permit Boise to perform acts that constitute a nuisance and violate the law. In *Lucas*, the Court noted that there would be no taking if "the proscribed use interests were not part of [the property owner's] title to begin with." 505 U.S. at 1027, 112 S.Ct. 2886. The Court further noted that such limitations "must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership." *Id.* at 1029, 112 S.Ct. 2886. The state's defense at issue here appears to rest on this part of the *Lucas* case.

The state offers no authority for the proposition that knocking down a bird's nest on one's property has ever been considered a public nuisance. The case on which it relies, *Columbia Fishermen's Union v. St. Helens*, 160 Or. 654, 87 P.2d 195 (1939), concerned a suit by fishermen to enjoin the city of St. Helens from dumping raw sewage into the Columbia River--a practice which, needless to say, was detrimental to the fish population on which the fishermen depended for their livelihoods. That case concluded that the fisherman had standing to maintain an action against the city. *Id.* at 666, 87 P.2d 195.

However, any analogy to the present case is less than clear. The court in *Columbia* indicated that the state could protect its navigable waters from pollution because it had an interest in *ferae naturae* (the fish) in the waters. It does not follow, as the state seems to posit, that any act taken by the state to protect *ferae naturae* on private property is the equivalent to an abatement of a public nuisance or, alternatively, any act by a private party to destroy *ferae naturae* on private property constitutes a public nuisance. *Cf. State Dept. of Env. Qual. v. Chem. Waste*, 19 Or.App. 712, 719, 528 P.2d 1076 (1974) ("defendant has been 'operating' the site in violation of the Environmentally Hazardous Wastes Statutes from the time they became effective in early 1972, [but] that continuing violation does not require a finding that the site constitutes a public nuisance"). The trial court correctly struck the state's defense that plaintiff's proposed logging constituted a public nuisance.

In its final assignment of error concerning the pleadings, the state argues that the trial court erred in striking its defense that it labeled as "failure to exhaust its administrative remedies." The state argues that Boise's regulatory takings claim is unripe because it did not make an effort to obtain an "incidental take" permit pursuant to 16 USC section 1539(a). *Former* OAR 660-24-809(5) provided that "[e]xceptions to the requirements for protecting northern spotted owl nesting sites may be approved by the State Forester if the operator has obtained an incidental take permit from federal authorities under the federal Endangered Species Act." The state argues that, because plaintiff did not attempt to avail itself of this exception, it may not yet assert a takings claim. The trial court granted Boise's motion to strike this defense without stating its reason for doing so. We therefore examine all of the arguments made to the trial court on this issue in order to determine if the trial court erred in striking this defense.

As an initial matter, Boise correctly points out that the state's argument is not so much an exhaustion of remedies argument as it is a ripeness argument. However, the terminology used in the caption is not dispositive here, as the parties clearly addressed the issue in the lower court as a ripeness issue, and Boise does not contend that the state failed to preserve this issue. We do not consider a mislabeling of a caption in the pleadings to be dispositive where the body of the pleading adequately describes the nature of the defense that is being asserted. *See Curran v. ODOT*, 151 Or.App. 781, 786 n. 4, 951 P.2d 183 (1997) (concluding under similar circumstances that ripeness issue was preserved).

Both parties agree that the relevant concept is laid out in the Court's decision in *Williamson Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985).[6] In *Williamson*, the plaintiff sought to develop certain property based on the preliminary approval of a plat map that had been obtained by its predecessor in interest. The planning commission disapproved the development because it failed to comply with numerous zoning ordinances. *Id.* at 176-83, 105 S.Ct. 3108. Rather than applying for variances from the zoning ordinances, the plaintiff sought just compensation under the Fifth Amendment. The Court looked to its earlier cases, *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 101 S.Ct. 2352, 69 L.Ed.2d 1 (1981), and *Agins v. Tiburon*, 447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980), stating that

> "a claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the

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[6] In *Williamson*, the Court explained the distinction between "exhaustion of remedies" and "ripeness" as follows:

> regulations has reached a final decision regarding the application of the regulations to the property at issue." *Williamson*, 473 U.S. at 186, 105 S.Ct. 3108.

The Court quoted from *Hodel*:

> "There is no indication in the record that appellees have availed themselves of the opportunities provided by the Act to obtain administrative relief by requesting either a variance * * * or a waiver * * *[.] If [the property owners] were to seek administrative relief under these procedures, a mutually acceptable solution might well be reached with regard to individual properties, thereby obviating any need to address the constitutional questions. The potential for such administrative solutions confirms the conclusion that the taking issue * * * simply is not ripe for judicial resolution." 452 U.S. at 297, 101 S.Ct. 2352.

The *Williamson* Court went on to note that, in *Agins*, the property owners had submitted a plan that was disapproved but, as they had not sought approval of any other type of plan, it "was not clear whether the Commission would deny approval for all uses that would enable the plaintiffs to derive economic benefit from the property." 473 U.S. at 187, 105 S.Ct. 3108. The *Williamson* Court concluded that the claim was unripe for the same reason that the claim in *Hodel* was unripe: had the plaintiff

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"While the policies underlying the two concepts often overlap, the finality requirement is concerned with whether the initial decision-maker has arrived at a definitive position on the issue that inflicts an actual, concrete injury; the exhaustion requirement generally refers to administrative and judicial procedures by which an injured party may seek review of an adverse decision and obtain a remedy if the decision is found to be unlawful or otherwise inappropriate."

sought and obtained available variances and waivers, the parties might have reached a mutually acceptable solution. *Id.* at 188-90, 105 S.Ct. 3108; *cf. Curran v. ODOT*, 151 Or.App. at 787, 951 P.2d 183 (addressing ripeness problem under Article I, section 18, of the Oregon Constitution, the court concluded that plaintiff's failure to apply for a permit that could have obviated "takings" meant that plaintiff's claim was not ripe); *Larson v. Multnomah County*, 121 Or.App. 119, 122, 854 P.2d 476, *adhered to on recons*. 123 Or.App. 300, 859 P.2d 574 (1993) (recognizing rule that if a landowner has unsuccessfully filed an application but has pursued no alternatives that could lead to approval, a takings claim is unripe).

The state maintains that plaintiff's claim suffers the same flaw as did the claims of the plaintiffs in *Williamson* and *Hodel*. The state argues that plaintiff's failure to seek an "incidental take" permit from the United States Fish and Wildlife Service pursuant to 16 USC section 1539(a), which is a prerequisite to any variance under *former* OAR 660-24-809(5) for destruction of northern spotted owl habitat, creates a ripeness problem similar to the ripeness problems of the plaintiffs in *Williamson* and *Hodel* due to their failure to seek variances that could have obviated the problem.

Boise responds by making several points. First, it notes that it is undisputed that, even if Boise had obtained an incidental take permit from the United States Fish and Wildlife Service, the state would not have been obliged to approve Boise's logging plan. That is true; under *former* OAR 660- 24-809(5), an incidental take permit is a prerequisite to state approval of a logging plan that destroys spotted owl habitat, but an incidental take permit does not, in itself, guarantee that the logging plan will be approved. However, nothing in *Williamson*, *Hodel* or *Agins* implies that a waiver or variance must be a "sure thing" in order for a plaintiff to be required to pursue such a remedy before bringing a takings claim.

Boise also suggested, in the course of its arguments on this issue to the trial court, that no incidental take permit would have been required in any event, for several reasons. First, Boise asserted that the Endangered Species Act only prohibits "taking" an endangered species, and destroying an endangered species' habitat does not fall within the definition of "take":

> "The term 'take' means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct." 16 USC Section 1532(19).
>
> We disagree with plaintiff's assertion that the definition of "take" does not encompass destruction of habitat. In *Babbitt v. Sweet Home Chapter, Etc.*, 515 U.S. 687, 115 S.Ct. 2407, 132 L.Ed.2d 597 (1995), the Court upheld an Interior Department rule that defined "harm" as including destruction of endangered species' habitat. *See also Palila v. Hawaii Dept. of Land and Natural Resources* (*Palila II*), 852 F.2d 1106, 1108 (9th Cir.1988) (same).

Boise also suggested in the trial court that, because the United States Department of Fish and Wildlife had enacted a regulation defining critical habitat for the spotted owl on federal lands but not on private land, Boise somehow was exempted from any requirement that it acquire an "incidental take" permit before taking owls on its private property. Boise argued:

> "[T]he USF & WS had published in the Federal Register its own regulations governing the Northern Spotted Owl. 57 Fed Reg 1796-01 (Jan 15, 1992 WL4601 (F.R.)). In that document it defined the critical habitat for the bird's recovery. It made a specific finding that private lands were not included in critical habitat, even where the surrounding federal lands had been so designated.

> Clatsop County contains no federal critical habitat areas for the Northern Spotted Owl and even the more than 100,000 acres of State commercial timberlands in the county have not been so designated."

It is unsurprising that the regulation found at 57 Fed Reg 1796 (Jan 15, 1992) referred only to critical habitat on federal lands, given that the regulation pertains only to section 7 of the Endangered Species Act, which is a section that sets forth the obligations of federal agencies in protecting endangered species. The prohibition on "*any person*" taking an endangered species, by contrast, is contained in section 9 of the Act,[7] which has a broader application that Section 7. The "incidental take" provisions are cross-referenced in section 1538, which pertains to "any person." The "incidental take" provisions are not limited to federal agency protection of endangered species under section 7. The summary of the regulation itself stated: "This critical habitat designation provides *additional* protection requirements under section 7 of the Act with regard to activities that are funded, authorized, or carried out by a Federal agency." 57 Fed Reg 1796 (Jan 15, 1992) (emphasis added). We conclude that this regulation has no direct bearing on whether Boise was excused,

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[7] 16 USC Section 1538(1) provides, in part:

> "(a) Generally:
>
> "(1) Except as provided in sections 1535(g)(2) and 1539 of this title, with respect to any endangered species of fish or wildlife listed pursuant to section 1533 of this title it is unlawful for any person subject to the jurisdiction of the United States to -
>
> " * * * * *
>
> "(B) take any such species within the United States or the territorial sea of the United States[.]"

as a matter of law, from seeking an incidental take permit under the Endangered Species Act as a prerequisite to the ripening of its takings claim against the state.[8]

Finally, Boise has suggested that it may be inferred from one of its trial exhibits that the state as much as admitted that it would not have approved Boise's logging plan even if Boise had applied for an incidental take permit. We understand Boise's argument to be an invocation of the "futility" exception to the ripeness requirement. *See generally Larson*, 121 Or.App. at 122, 854 P.2d 476 (describing "futility" exception).

For two reasons, either of which is independently dispositive, we reject Boise's assertion of futility. First, the question before us is whether the trial court erred in striking the state's defense on the pleadings; that question cannot be answered by reference to a trial exhibit that might, as a factual matter, be determinative of whether the state *prevailed* on that defense. Second, assuming for the sake of argument that that were not the case, the trial exhibit to which Boise refers does not indicate that it would be futile for Boise to obtain an incidental take permit. Rather, it indicates that the state's decision would not depend solely on the issuance of such a permit and that a decision by the federal government that such a permit was not required would not satisfy the Oregon administrative rule. One of the state's trial exhibits, on the other hand, is a letter of advice to Boise from the Assistant Regional Director of the United States

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[8] It is possible that the designation of critical habitat on federal lands could, in fact, affect whether or how incidental take permits are granted for taking endangered species on private lands. That, however, has no bearing on whether the state's defense based on Boise's failure to even attempt to get an incidental take permit should have been stricken from the pleadings.

Department of the Interior Fish and Wildlife Service indicating that "an incidental take permit is required when otherwise lawful activities will incidentally take a threatened species" and suggesting that they should visit the proposed logging site, after which the agency "should be better able to discuss the situation and advise you regarding [an] incidental take permit." Neither of these trial exhibits, alone or together, indicate that it would have been futile for Boise to pursue an incidental take permit. We conclude that none of Boise's arguments in support of its motion to strike the state's defense that the claim was not ripe are meritorious. The trial court erred in striking the state's defense.

Because of our disposition of this assignment of error, we need not reach the state's numerous assignments of error pertaining to the conduct of the trial.

Reversed and remanded.

IN THE COURT OF APPEALS
OF THE STATE OF OREGON

BOISE CASCADE CORPORATION, a Delaware corporation,	)	Clatsop County Circuit Court No. 93-2018
Plaintiff-Respondent,	)	
v.	)	CA A100855
STATE OF OREGON, by and through the Oregon State Board of Forestry,	)	**ORDER DENYING PETITION FOR RECONSIDERATION**
Defendant-Appellant.	)	

Appellant has filed a petition for reconsideration of the Court's decision dated November 10, 1999, pursuant to ORAP 6.25. Opposing counsel has filed an objection to the petition.

The petition is denied.

/s/ Paul J. De Muniz
PAUL J. DE MUNIZ
PRESIDING JUDGE

MAR 15 2000
DATE

c: David F. Coursen
Phillip D. Chadsey
Daniel H. Kearns
John M. Groen

REPLIES SHOULD BE DIRECTED TO THE STATE COURT ADMIN., RECORDS SECTION, SUPREME COURT BLDG., 1163 STATE ST., SALEM, OR 97310

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IN THE SUPREME COURT
OF THE STATE OF OREGON

BOISE CASCADE CORPORATION, a Delaware corporation,	)	Clatsop County Circuit Court No. 93-2018
Plaintiff-Respondent, Petitioner on Review,	)	
	)	SC S47459
v.	)	CA A100855
STATE OF OREGON, by and through the Oregon State Board of Forestry,	)	
Defendant-Appellant, Respondent on Review.	)	ORDER DENYING REVIEW

Upon consideration by the court.

The Court has considered the petition for review and ORDERS that it be denied.

Dated this 24th day of October 2000.

/s/ Wallace P. Carson Jr.
WALLACE P. CARSON JR.
CHIEF JUSTICE

Kulongoski, J., not participating

c: Phillip D. Chadsey
David Farris Coursen
John M. Groen

S47459-Den.wpd

Paula J. Brownhill, Circuit Judge
(503) 325-8555

Philip L. Nelson, District Judge
(503) 325-8536

CIRCUIT/DISTRICT COURT OF THE
STATE OF OREGON
FOR THE COUNTY OF CLATSOP
Clatsop County Courthouse
749 Commercial
PO Box 659
Astoria, OR 97103

October 16, 1997

Phillip D. Chadsey
Attorney at Law
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Re: *Boise Cascade Corporation vs. State of Oregon*
Case No. 93-2018

Gentlemen:

I ruled on several motions at the September 22, 1997 hearing. Mr. Chadsey submitted an order reflecting those rulings on September 30, 1997. I signed it today and directed the clerk to file the second amended complaint and answer.

There are two matters under advisement. I will deny defendant's supplemental Rule 21 motion to dismiss for failure to state a claim. I will allow plaintiff's motion for partial summary judgment on Count 3 of the amended complaint. Mr. Chadsey, please prepare an order that reflects these rulings.

Yours truly,

/s/ Paula Brownhill

Paula Brownhill

FILED
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TRIAL COURT ADMINISTRATOR

IN THE CIRCUIT COURT
FOR THE STATE OF OREGON
COUNTY OF CLATSOP

BOISE CASCADE CORPORATION, a Delaware corporation, Plaintiff, v. STATE OF OREGON, by and through the OREGON STATE BOARD OF FORESTRY, Defendant.	Case No. 93-2018 SPECIAL INTERROGATORY VERDICT

We, the Jury, find:

1. Was plaintiff Boise Cascade Corporation required to submit to a physical occupation of its property as a result of the Board of Forestry's order denying its written plan to log the subject property from January 15, 1993?

ANSWER: Yes X **No** ____

Proceed to question 2.

2. On January 15, 1993, what was the fair market value of the timber that plaintiff was unable to log due to the Board of Forestry's order?

ANSWER: $2,279,233

Proceed to question 3.

3. On October 17, 1997, what was the fair market value of the timber?

ANSWER: $1,615,425

DATED November 21, 1997.

/s/ Constance Bourquein
Presiding Juror

FILED
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TRIAL COURT ADMINISTRATOR
By /s/ unreadable

IN THE CIRCUIT COURT
OF THE STATE OF OREGON
FOR THE COUNTY OF CLATSOP

BOISE CASCADE, a Delaware corporation,	
Plaintiff,	No. 93-2018
v.	JUDGMENT
STATE OF OREGON, by and through the OREGON STATE BOARD OF FORESTRY,	
Defendant.	

Pursuant to the order of dismissal entered in this case on April ____, 1993 and incorporated herewith, it is ORDERED:

1. Judgment is hereby entered in favor of defendant.

2. Plaintiff's Supplemental Complaint is dismissed with prejudice.

3. Costs shall be determined subsequently pursuant to ORCP 68.

Dated this 30 day of April, 1993.

/s/ Thomas E. Edison
Thomas E. Edison
Circuit Court Judge

PRESENTED BY:
Phillip D. Chadsey, OSB No. 66028
Of Attorneys for Plaintiff

BOISE CASCADE CORPORATION, a Delaware corporation, Appellant,

v.

BOARD OF FORESTRY, Respondent.

93-2018; CA A79626.

Appeal from Circuit Court, Clatsop County
Thomas E. Edison, Judge

Court of Appeals of Oregon.
886 P.2d 1033 (Or. App. 1999)

Argued and Submitted July 15, 1994.
Decided Dec. 7, 1994.

Phillip D. Chadsey, Portland, argued the cause for appellant. With him on the briefs was Stoel Rives Boley Jones & Grey.

Virginia L. Linder, Sol. Gen., argued the cause for respondent. With her on the brief were Theodore R. Kulongoski, Atty. Gen. and John T. Bagg, Asst. Atty. Gen.

Before ROSSMAN, P.J., and De MUNIZ and LEESON, JJ.

De MUNIZ, Judge.

Reversed and Remanded.

Plaintiff appeals from the judgment for defendant Board of Forestry ("board") in this inverse condemnation action arising out of the board's refusal to permit logging operations on

plaintiff's property in which a spotted owl nesting site is located. Plaintiff contends that the board's refusal gives rise to an uncompensated taking of its property in violation of the Fifth Amendment to the federal constitution and Article I, section 18, of the state constitution. The trial court granted the state's ORCP 21 motion to dismiss on the grounds that the court lacked subject matter jurisdiction, that the action was not ripe and that plaintiff's complaint[1] failed to state takings claims. We disagree with the trial court that the motion to dismiss was properly granted on any of those grounds, and we reverse and remand.

For purposes of reviewing the granting of a motion to dismiss for failure to state a claim under ORCP 21A(8), we take as true the allegations in the complaint, along with any facts that might be adduced to prove the allegations. *Doyle v. Oregon Bank*, 94 Or.App. 230, 232, 764 P.2d 1379 (1988), *rev. den.* 307 Or. 571, 771 P.2d 1021 (1989).[2] With two exceptions that we will discuss below, the state accepts the statement of facts in plaintiff's opening brief as adequately summarizing the complaint. Accordingly, we take the facts that are material to our discussion from plaintiff's statement:

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[1] We use the generic term "complaint" to refer to the supplemental complaint on which the parties ultimately proceeded.

[2] Although the allegations in the complaint do not play the same definitive role with respect to the jurisdictional issue, *see* ORCP 21A(1), the facts concerning it are undisputed, and it is resolvable solely on legal grounds. Ripeness issues fall in a gray area, in that they are not jurisdictional, and they are *usually* presented as matters of defense. However, the ripeness contentions presented here turn in part on a purely legal question and in part on factual questions that cannot be conclusively answered on the basis of this record--whether inside the complaint or out. It is unnecessary for us to decide whether we may look beyond the complaint to resolve the state's ripeness arguments because, at this stage of the case, they fail whether or not we do.

"Boise Cascade has been the owner of real property in Clatsop County, consisting of approximately 65 acres of commercial timberland, which is known as the 'Walker Creek Unit' * * *. The Walker Creek Unit is the only commercial timberland that plaintiff owns in Clatsop County.

"In October 1988, Boise Cascade acquired the Walker Creek Unit. At that time and all times since, it has been zoned as commercial timberland. The Walker Creek Unit also cannot be developed or used for a commercial purpose that is not authorized by Land Conservation and Development Commission Goal 4 governing forestlands. OAR 660-06-000, et seq. That goal limits commercial activities on such lands to forest operations related to the growing and harvesting of any tree species as defined in ORS 527.620(6) and certain locationally dependent or compatible forest uses. Consistent with that goal, ORS 527.630(1) provides, in part, that 'it is declared to be the public policy of the State of Oregon to encourage economically efficient forest practices that assure the continuous growing and harvesting of forest tree species and the maintenance of forestland for such purposes as the leading use on privately owned land * * *.' At the time plaintiff acquired the subject property and at all times since, the Oregon Threatened or Endangered Wildlife Species Act, (ORS 496.192(1)), has provided, in part, that it was not intended 'to require an owner of any commercial forestland or other private land to take action to protect a threatened species or endangered species, or to impose additional requirements or restrictions on the use of private land.'

"Plaintiff acquired the Walker Creek Unit with the reasonable economic expectation that it could log the existing merchantable timber on the property and replant it with forest tree species in order to provide future merchantable timber harvests from the unit. The existing merchantable timber on the Walker Creek Unit consists of old and second growth Douglas Fir, Western Red Cedar, and Western Hemlock.

"In August 1990, the Oregon State Forester adopted an interim spotted owl policy precluding timber harvest within a 70-acre core area 'of the best available suitable habitat in the vicinity of the [nest] site.' Also in 1990, a pair of spotted owls were found nesting on a tree within the Walker Creek unit. Old growth timber of the kind found on the Walker Creek Unit is considered to be the best suitable habitat for spotted owls. The Board subsequently adopted OAR 629-24-809, which requires protection of a 70-acre core area of suitable habitat encompassing the nest site.

"Commercial timberland, consisting of trees that are 70 years or less in age, is not considered to be the 'best' suitable owl habitat if old growth timber is also available in the vicinity of the nest site. In addition to the pair in the Walker Creek Unit, a number of other pairs of spotted owls have been found in Clatsop County. Some of those nest on State of Oregon-owned timberland that does meet the habitat requirements of OAR 629-24-809. Spotted owls have been found in 50- to 60-year old timber in the Buster Creek drainage in Clatsop County. Several pairs of spotted owls have been found in the Jewell area, which is approximately four air miles from the Walker Creek Unit. Spotted owls, including juveniles when they fledge, will often fly 20 miles or more in order to find new suitable habitat.

"On January 7, 1992, plaintiff filed Notification No. 92-521-11022 giving notice to the Oregon State Forester of its intent to conduct an operation and harvest timber on the Walker Creek Unit. Because of the location of protected waters on or near the Walker Creek Unit and the Walker Creek Unit's identification as spotted owl habitat, a written logging plan was required. Plaintiff filed such a plan on February 4, 1992. The plan provided that, if a pair of owls nested in the operations area in 1992, no operation would be conducted during the critical period of use, March 1 to September 30, or until the young owls had fledged, in order to avoid any incidental harm to the owls

while they were present in the area. That plan was denied approval on February 24, 1992, on the ground that it failed to describe how the operation would be conducted to provide a 70-acre core area of suitable owl habitat consistent with the requirements of OAR 629-24-809.

"On May 5, 1992, plaintiff submitted an amended written logging plan. The amended plan reported that a pair of spotted owls was then known to be nesting in a tree within the harvest area, although it was a different site from the one that had been occupied by a pair of owls in 1990. The amended plan provided that plaintiff would not conduct operations in the area while the owls were present. With respect to the habitat identification requirement, the amended plan specifically provided that there were more than 70 acres of commercial timberland immediately adjacent to the Walker Creek Unit that were owned by the State of Oregon and that could provide habitat for the owls after plaintiff's property had been logged. Except for the subject timber which plaintiff desires to log, there is not sufficient 'suitable spotted owl habitat,' as defined by OAR 629-24-809(1)(a), in the immediate area of the Walker Creek Unit to meet the requirements of that statute. Further, the only known nest trees in the immediate area of the Walker Creek Unit to meet the requirements of that area are located within the unit which plaintiff desires to log. On May 15, 1992, approval of the amended plan was denied. In denying plaintiff's amended plan, the Oregon Department of Forestry identified the core areas consisting of approximately 56 acres of plaintiff's unit, nine acres of another private landowner's timber, and approximately five acres of adjacent timberland owned by the State of Oregon. The Oregon Department of Forestry did advise plaintiff that there were eight acres in its Walker Creek Unit that could be harvested.

"Plaintiff then took a timely appeal of the Oregon Department of Forestry's denial of its amended plan to the

Board. As a basis for that appeal, plaintiff claimed that the Board's requirement that plaintiff set aside any part of its merchantable timber, including the nest trees, for spotted owl habitat constituted a taking of such property for a public purpose which requires just compensation under Article I, section 18, to the Oregon Constitution and the Fifth and Fourteenth Amendments to the United States Constitution. After a contested case hearing was held, on January 6, 1993, the Board refused to waive the 70-acre nest site requirement in order to permit plaintiff to log its Walker Creek Unit, and on January 15, 1993, it entered a final order which affirmed the denial of plaintiff's amended plan. The denial of plaintiff's written plan by the Board was a final administrative action prohibiting plaintiff from logging the subject timber.

"The timber, including the two nest trees, on the Walker Creek Unit which plaintiff desires to log has no economic value unless harvested. The Board's action in denying plaintiff the right to log the Walker Creek Unit has denied it of all economic use of that timber. Apart from the subject merchantable timber, the underlying commercial forestland has no separate economic value until the timber has been logged. After logging and replanting, with young forest tree species as required by law, the land would have a fair market value of $500 per acre.

"Since 1987, when the northern spotted owl was designated as a 'threatened species' pursuant to ORS 496.172, et seq., the State of Oregon has continued to sell its own merchantable timber in Clatsop County for the purpose of having it logged in order to provide revenue to various governmental entities and to manage its commercial timberland for future timber production. The State of Oregon has sold stands of merchantable timber that it owns within 20 miles of plaintiff's Walker Creek Unit even after the Board refused to permit plaintiff to log its merchantable timber.

"After the amended plan was denied approval by the Board in January 1993, on February 22, 1993, plaintiff submitted a written plan No. 93-251-11132 to log four acres of its Walker Creek Unit that the Oregon Department of Forestry had previously agreed could be harvested. On March 8, 1993, the Oregon Department of Forestry approved that plan, subject to the condition that logging operations not begin until October 1, 1993, and end by March 1, 1994, because of the close proximity of those four acres to the spotted owl nest sites in the adjacent core area.

"On March 19, 1993, plaintiff appealed to the Board the temporal condition placed on its right to log the four acres on the basis that the restriction constituted a temporary taking of the subject timber. After a hearing, the Board on April 19, 1993, issued its order refusing to remove the temporal condition which prevents plaintiff from commencing logging operations before October 1, 1993. The Board's action in refusing to remove the temporal condition was a final administrative action which prevents plaintiff from logging its timber in a timely manner.

"Boise Cascade is presently deprived of all economic use of its merchantable timber on the subject four acres."

The two aspects of plaintiff's factual recitation with which the state disagrees are, in the state's words, the allegations that "plaintiff is presently deprived of all economic use of its merchantable timber on land governed by the restriction in OAR 629-24-809," and that the "underlying commercial forestland has no separate economic value until the timber has been logged." The state argues that both allegations are conclusions of law, which should not be considered in determining whether the complaint states a claim. The state also argues that the second allegation is legally wrong, because the timber and the land are not separable property interests, and the land has value notwithstanding regulations on the logging of the timber.

The state is incorrect on both points. The state's argument concerning the separability of the timber and the land is adversely answered by *Hawkins v. City of La Grande*, 315 Or. 57, 70-71, 843 P.2d 400 (1992), and its efforts to distinguish that case do not persuade us. Moreover, for purposes of our review of the motion to dismiss, the point is close to academic: Plaintiff alleges that, if it cannot log the land, the land has no economically viable or beneficial use. In other words, plaintiff alleges that, at least as of now, it has lost all economic and beneficial use of the land, as well as of the timber, by virtue of the restrictions on logging.

The state's second point apparently is premised on the fact that loss of all economically viable or substantial beneficial use of property is the legal test for whether a regulatory taking can be found under the Fifth Amendment and Article I, section 18, respectively. *See Lucas v. South Carolina Coastal Council*, ____ U.S. ___, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992); *Fifth Avenue Corp. v. Washington Co.*, 282 Or. 591, 581 P.2d 50 (1978). However, whether such a loss has occurred is also a factual question, and it is an ultimate question of fact in a regulatory takings case.

Plaintiff's pleading of that fact, coupled with the state's choice to proceed by a motion to dismiss, makes the disposition of this appeal turn on what is alleged in the complaint rather than on what the factual and legal merits of the parties' cases may ultimately prove to be. Many of the state's arguments in this appeal present matters that are outside the complaint. As noted, our review of a motion to dismiss for failure to state a claim starts with the premise that all well-pleaded allegations in the complaint are true, and our review is confined to matters that appear in the complaint. ORCP 21A; *Emmert v. O'Brien*, 72 Or.App. 752, 754, 697 P.2d 222 (1985).

For that reason, at *this* stage of the present case, we are in much the same position that the reviewing courts were in *Lucas v. South Carolina Coastal Council, supra*. As the Oregon Supreme Court observed in *Dodd v. Hood River County*, 317 Or. 172, 183 n. 13, 855 P.2d 608 (1993), the state in *Lucas* "chose not to contest at any level the landowner's allegation that his land had been rendered absolutely worthless" by the regulation in question. Here, the state's motion to dismiss for failure to state a claim concedes plaintiff's corresponding allegation for purposes of the ruling on the motion and of our disposition of the present appeal. The difference between the cases is that, in *Lucas*, the state's failure to deny the contention *at any point* amounted to a confession of ultimate judgment, while in this case the presumption of the allegation's truth extends only to the proceedings on the preliminary motion that is now before us. With the foregoing as prologue, we turn to the parties' specific arguments.

In its first assignment, plaintiff contends that the court erred by ruling that it lacked subject matter jurisdiction. The apparent basis for the ruling, and the principal basis on which the state defends it in this appeal, was that the board's action was taken in the context of a contested case proceeding, and it is subject to exclusive review under applicable provisions of the Administrative Procedures Act (APA). ORS 183.310 *et seq.*; *see* ORS 183.482.[3]

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[3] Plaintiff has sought APA review of the board's orders, and we have issued our decision on those petitions simultaneously with this decision. *Boise Cascade Corp. v. Board of Forestry*, 131 Or.App. 552, 886 P2d 1041 (1994). Some of the jurisdictional arguments we address here appear in the parties' briefs in that case rather than in their presentations in this appeal. However, because the issue is jurisdictional, we are free to consider factors the parties do not raise here, as well as those they do.

The remedy plaintiff seeks here is compensation for the taking that it contends the board's action has occasioned. If all of plaintiff's material allegations are found to be true, its right to that remedy does not depend on whether the board's orders are reversible on direct review. Stated another way, plaintiff does not seek review in this case of what the board *did* but seeks relief for the taking that it maintains the board action has *caused*. Accordingly, plaintiff contends that an inverse condemnation proceeding is not made unavailable on the ground that there is an exclusive APA remedy, because it is not seeking review of the correctness of the board's orders; rather, plaintiff is contending that, right or wrong, the orders impose a regulation that results in a taking. We agree with plaintiff on that aspect of its jurisdictional argument. This action is not part of the administrative process and is not subject to or restricted by the APA. However, the parties' other jurisdictional contentions require more extensive discussion.

Both parties rely on *Dunn v. City of Redmond*, 303 Or. 201, 735 P.2d 609 (1987). The Supreme Court held there that takings claims may be asserted in circuit court inverse condemnation actions, as well as in appeals to the Land Use Board of Appeals (LUBA) from local land use decisions. Each party relies on language in *Dunn* that, read in its selected context, supports the party's position. The state takes the view that *Dunn* supports the proposition that an agency has "primary jurisdiction" to decide whether its regulation gives rise to a taking; only after the agency has made that determination does circuit court authority arise to decide actions that can culminate in monetary relief. According to the state, not until an agency has decided whether a taking would result from its regulatory action can it be appropriate for damages to be considered; up to that point, the agency has the right to change its regulatory decision and thereby avoid both the need for compensating a landowner and the circuit court proceeding that could result in that remedy. Hence, the state concludes that the circuit courts do

not obtain jurisdiction before the agency has decided initially whether a regulatory taking has resulted from its regulatory action.

In *Springer v. City of Bend*, 111 Or.App. 136, 826 P.2d 1, *rev. den.* 313 Or. 354, 833 P.2d 1283 (1992), and *Nelson v. City of Lake Oswego*, 126 Or.App. 416, 869 P.2d 350 (1994), we addressed the effect of *Dunn* on circuit court jurisdiction and authority over inverse condemnation claims. We said in *Springer* that the Supreme Court had concluded in *Dunn*:

> "[A]lthough damages for inverse condemnation could only be recovered in a judicial action, 'regulatory takings' issues could arise as constitutional questions and be relevant in LUBA's disposition of appeals from local land use decisions. The court concluded that inverse condemnation issues could be asserted in both forums.
>
> "Circuit courts have always had jurisdiction-- exclusive *or* concurrent--to try inverse condemnation claims; neither [the Supreme Court's nor this court's] opinion in *Dunn* did anything to change that, and both in fact reiterated it." 111 Or.App. at 138-39, 826 P.2d 1. (Emphasis in original; footnote omitted.)

However, we also noted in *Springer*:

> "The Supreme Court suggested that there might be circumstances in which a circuit court must delay a decision on an inverse condemnation claim until LUBA has decided a corresponding issue that is pending before it." 111 Or.App. at 139 n. 1, 826 P.2d 1.

If the question here was whether LUBA or the circuit court had initial *authority* to decide the question, we might agree with the distinction that the state draws as it applies to that

agency's initial authority and the circuit court's.[4] For a number of reasons, however, we cannot agree with the state's argument that, under *Dunn* or our cases, the circuit court lacked *jurisdiction* over this action. First, both *Dunn* and *Springer* make clear that the circuit courts *retain* their historical jurisdiction over inverse condemnation claims. *Dunn* does not purport to change that but, rather, holds that the statutes governing LUBA review *add* a form of concurrent LUBA jurisdiction; *Dunn* also holds that issues relating to the sequence of LUBA's and the courts' authority to act will arise in some contexts. However, neither of those holdings divests the circuit court of subject matter jurisdiction over inverse condemnation actions. They simply address the allocation or timing of authority between bodies that share jurisdiction.

The other reasons for our conclusion stem from the fact that the issue in this case does not involve LUBA's authority to decide takings questions; instead, the state asserts that agencies other than LUBA, whose regulations purportedly give rise to

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[4] The court in *Dunn* summarized its holding:

> "In sum, if an owner seeks to have a land use decision set aside on constitutional grounds, the owner must take that appeal to LUBA. An owner who maintains that the government's acts entitle him to compensation may seek compensation in [the] circuit court. If the owner seeks invalidation of the land use decision or compensation in the alternative, or both, and the government defends the validity of its regulatory decision and denies that compensation is due, the court may have to withhold judgment until the legality of the land use decision is placed before and decided by LUBA and the government has had an opportunity to reconsider and modify its decision. The special provision for taking evidence beyond the record made before the local government, ORS 197.830(1), as was done here, shows that a full LUBA review of whatever may bear on the constitutionality of a land use decision was not beyond legislative contemplation." 303 Or. at 209, 735 P.2d 609.

takings, have initial jurisdiction of the kind defined in *Dunn* to decide whether their own actions have occasioned takings. However, the court in *Dunn* did not purport to make a general or abstract allocation of jurisdiction or authority between the circuit courts and all agencies; rather, the *Dunn* decision was based very specifically on the statutes that confer jurisdiction on LUBA to review land use decisions and constitutional questions that arise in connection with them. *See* ORS 197.835(7)(a)(E). On the basis of that statutory analysis, the court concluded that the legislature has conferred jurisdiction on LUBA to share part of the circuit courts' historical decisional authority over takings questions.

The state attempts by analogy to equate LUBA's role and the board's under the *Dunn* rationale. The analogy does not succeed because, *inter alia*, LUBA is an adjudicative agency, while the board is the regulatory agency whose action is subject to adjudication to determine if it has resulted in a taking. The proper analogy is not between the board and LUBA, but between the board and a governmental body, as described in *Dunn*, that chooses to "[defend] the validity of its regulatory decision" before LUBA or the courts. 303 Or. at 209, 735 P.2d 609.

Whether it is performed by LUBA or the courts, the determination of whether a regulatory action results in a taking of private property is an adjudicative act. Leaving aside the fox in the henhouse problem with the state's contention that a regulatory agency should have sole original jurisdiction to decide in the same order that imposes a regulation whether the regulation results in a taking, the state's argument is mechanically flawed: The adjudication of whether there has been a regulatory taking will generally be dependent on a showing of facts that cannot even be known at the time that the regulatory decision is made, *e.g.*, the scope of the regulation's impact on a particular landowner's ability to make viable economic use of particular land. Although regulatory agencies obviously may consider

whether their prospective actions might result in takings, nothing in *Dunn* or in logic supports the view that they have jurisdiction, to the exclusion of the circuit courts, to decide whether their own consummated regulatory actions have resulted in takings.[5]

We reject the state's jurisdictional argument, and we conclude that the trial court erred by ruling that it lacked jurisdiction. We turn to the ripeness issue. It is unclear whether the state's contention that the APA provides plaintiff's exclusive remedy is meant to relate solely to jurisdiction, or is also meant to suggest that the action is not ripe, because plaintiff did not exhaust available appeals from the board's orders to reviewing bodies before bringing this action. If the latter point is intended, we rejected a materially similar contention in *Nelson v. City of Lake Oswego, supra*, and we reject the present variation of it as well. The state's other ripeness arguments depend on facts that cannot be determined from the complaint or the record before us. *See* n. 2, *supra*. We hold that it was error to dismiss the action on ripeness grounds.

The remaining question is whether the trial court was correct in ruling that plaintiff's complaint fails to state a claim. The state makes a number of arguments that are directed against specific allegations and theories that plaintiff pleads. However, the state also makes one argument attacking the sufficiency of plaintiff's complaint as a whole. It contends that plaintiff did not

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[5] We need not decide here whether the board has *any decisional* authority over such questions. The issue is whether the circuit court has jurisdiction. *See also Boise Cascade Corp. v. Board of Forestry, supra*, 131 Or.App. at 555 n. 1, 886 P.2d at 1043 n. 1.

> We note that there was no "land use decision" or other event here that could have been appealed to LUBA. The board is the only agency that was or could have been involved in the relevant final decisions.

and cannot plead that the alleged taking was an act by "a state agency authorized to exercise the power of eminent domain." According to the state, the board has no authority to condemn property. The state argues that that is an essential element of an inverse condemnation claim under *Tomasek v. State*, 196 Or. 120, 147, 248 P.2d 703 (1952), and later cases that follow it. However, the state reads *Tomasek* too literally; on the page of its opinion following the language on which the state relies, the court rejected as an "erroneous premise" the defendant's contention "that a distinction is to be drawn between the state itself and its agencies." 196 Or at 148, 248 P.2d 703.

More fundamentally, unlike the present case, *Tomasek* did not involve an alleged *regulatory* taking. Assuming that the state correctly reads *Tomasek* in its own context, the principle the state derives from it has no logical application in the regulatory takings context. It would be nonsensical to hold that there can be no regulatory taking claim if the regulatory agency whose action allegedly causes the taking happens not to have the power to condemn as well as the power to regulate. Even assuming that the Fifth Amendment would permit the state to make inverse condemnation proceedings unavailable for regulatory taking claims that are unrelated to the potential exercise of the eminent domain power, *Dunn v. City of Redmond, supra*, and *Springer v. City of Bend, supra*, make it clear that such proceedings are available for that purpose in this state.

Although plaintiff pleads a variety of *theories*, it has attempted to state only two *claims*: that there has been a taking of the "core" area of its property and that there has been a temporary taking of the four-acre tract that was subject to the board's "temporal" restriction on logging. In both contexts, plaintiff alleges, in essence, that the government has regulated its property in such a way that productive uses are unavailable and all viable economic and beneficial use has been eliminated. Those allegations suffice to state regulatory taking claims under

both constitutions as to the principal part of the property, *see Lucas v. South Carolina Coastal Council, supra*; *Fifth Avenue Corp. v. Washington Co., supra*, and a temporary taking of the four-acre part. *See First Lutheran Church v. Los Angeles County*, 482 U.S. 304, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987).

Because the motion to dismiss was directed against and allowed as to the entire complaint, it is unnecessary for us to decide whether any or all of plaintiff's alternative taking theories may prove to be factually or legally tenable. We nevertheless note that, even assuming the correctness of plaintiff's legal premises, the presence or absence of the requisite facts to support plaintiff's permanent physical occupation and its reasonable investment-backed expectations theories cannot be determined without further evidentiary development.

The parties' remaining arguments either require no further separate discussion or relate to matters that are beyond the reviewable record.

Reversed and remanded.

325 Or. 185, 935 P.2d 411

BOISE CASCADE CORPORATION, a Delaware corporation, Respondent on Review,

v.

BOARD OF FORESTRY, Petitioner on Review.

CC 93-2018; CA A79626; SC S42159.

Supreme Court of Oregon

Argued and Submitted Jan. 10, 1996.
Decided April 10, 1997.

Virginia L. Linder, Solicitor General, Salem, argued the cause for petitioner on review. With her on the brief were Theodore R. Kulongoski, Attorney General, and John T. Bagg, Assistant Attorney General.

Philip D. Chadsey, of Stoel Rives Boley Jones & Grey, Portland, argued the cause for respondent on review. With him on the briefs was Charles F. Adams.

Before CARSON, C.J., and GILLETTE, VAN HOOMISSEN, FADELEY and DURHAM, JJ.*

On review from the Oregon Court of Appeals.

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* Unis, J., retired June 30, 1996, and did not participate in this decision; Graber, J., did not participate in the consideration or decision of this case.

GILLETTE, Justice.

This is an inverse condemnation case in which plaintiff Boise Cascade asserts that the defendant State of Oregon, acting through its Board of Forestry, has "taken" certain property of Boise Cascade by promulgating a rule that, Boise Cascade alleges, denies Boise Cascade all beneficial use of the property.[1] The state seeks review of a decision of the Court of Appeals, which reversed a circuit court order that dismissed plaintiff's inverse condemnation action under ORCP 21[2] on several grounds. *Boise Cascade Corp. v. Board of Forestry*, 131 Or.App. 538, 886 P.2d 1033 (1994) ("*Boise I*").[3] There are two

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[1] "Inverse condemnation" refers to a claim "against a governmental agency to recover the value of property taken by the agency although no formal exercise of the power of eminent domain has been completed by the taking agency." *Lincoln Loan v. State Hwy. Comm.*, 274 Or. 49, 51 n. 1, 545 P.2d 105 (1976) (citing *Thornburg v. Port of Portland*, 233 Or. 178, 180, 376 P.2d 100 (1963)).

"'Eminent domain' is the power inherent in a sovereign state of taking or of authorizing the taking of any property within its jurisdiction for a public use or benefit." *GTE Northwest, Inc. v. Public Utility Commission*, 321 Or. 458, 466, 900 P.2d 495 (1995) (citing *Dept. of Trans. v. Lundberg*, 312 Or. 568, 571 n. 1, 825 P.2d 641 (1992)).

[2] ORCP 21 A(8) provides:

> "Every defense, in law or fact, to a claim for relief in any pleading, whether a complaint, counterclaim, cross-claim or third party claim, shall be asserted in the responsive pleading thereto, except that the following defenses may at the option of the pleader be made by motion to dismiss: * * * (8) failure to state ultimate facts sufficient to constitute a claim[.]"

[3] *Boise I* was consolidated for purposes of oral argument in this court with our review of *Boise Cascade Corp. v. Board of Forestry*, 131 Or.App.

issues before us: (1) whether, in an inverse condemnation proceeding of this kind, a court should (or must) stay its own proceeding until the agency first has an opportunity to determine whether the application of its rule effected a "taking" and, if not, (2) whether plaintiff has stated a claim in this case. We conclude that plaintiff's complaint properly was before the circuit court, because the circuit court and the Board share concurrent jurisdiction in this case. We also conclude that certain of the allegations in plaintiff's complaint are sufficient to survive a motion to dismiss.

FACTS

In February 1992, plaintiff filed a proposal with the Oregon Department of Forestry ("the Department") to log a 64-acre parcel of plaintiff's land (the "Walker Creek Unit").[4]

552, 886 P.2d 1041 (1994) ("*Boise II*"). *Boise II* involves two petitions for judicial review of two final orders of the Board of Forestry. The first final order, dated January 15, 1993, denied plaintiff's plan to log the same 64-acre property owned by plaintiff that is the subject of the present case. The second final order, dated April 19, 1993, approved plaintiff's plan to log four acres within the larger parcel, subject to a temporal restriction that no logging occur during spotted owl nesting season. Plaintiff sought judicial review of both final orders in the Court of Appeals. The Court of Appeals consolidated the two administrative petitions (*Boise II*), but did not consolidate the circuit court appeal (*Boise I*) with *Boise II*.

[4] The Oregon Blue Book adequately describes the relationship between the Board of Forestry, State Department of Forestry, and the State Forester as follows:

> "The seven-member board [of forestry], appointed by the governor, makes policy and provides vision to the overall management and protection of the state's 11 million acres of state-owned and private forest land. It operates under ORS chapter 526 in setting forest policy for the state. The board authorizes a forestry program

The land contains northern spotted owl nests and is subject to the northern spotted owl protection provisions of OAR 629-24-809, which the Board of Forestry ("the Board") adopted in 1990.[5] The Department denied the proposal on the ground that the logging plan did not provide sufficient protection for spotted owl habitat, as required by OAR 629-24-809.

In May 1992, plaintiff submitted an amended logging plan. The Department again denied the proposal, pursuant to OAR 629-24-809, but advised plaintiff that eight specified acres of the Walker Creek Unit could be logged, if the logging did not take place either between March 1 and September 30, 1992

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for Oregon designed to assure an adequate future wood supply to benefit society, the economy and the environment.

"The Department of Forestry, authorized by ORS 526.008 and established in 1911, is under the direction of the state forester, who is appointed by the Board of Forestry. The statutes direct the state forester to act on all matters pertaining to forestry, the protection of forest lands and the conservation of forest resources."

Claire Levine, ed., *1995-96 Oregon Blue Book*, 67 (1995).

[5] OAR 629-24-809 provides, in part:

"(1) Whenever the State Forester determines that an operation will conflict with protection of a nesting site of the northern spotted owl * * *, the operator must obtain the State Forester's approval of a written plan before commencing the operation. The written plan, at a minimum, must address how the operation will be conducted to provide for the following:

"(a) A 70 acre area of suitable spotted owl habitat encompassing the nest site, to be maintained as suitable spotted owl habitat;

"(b) Prevention of disturbances resulting from operation activities which cause owls to flush from the nesting site. Such

(which was the critical period of use), or until young spotted owls fledged. Plaintiff appealed that decision to the Board arguing, inter alia, that such an application of OAR 629-24-809 to its Walker Creek Unit property effected a "taking" of that property under the state and federal constitutions.

On January 15, 1993, the Board rejected plaintiff's challenge and entered a final order denying plaintiff's logging plan for the 64 acres. With respect to plaintiff's "takings" argument, the Board stated:

> "Boise Cascade appears to have been undecided as to the appropriate time to advance this argument. Although it asserts * * * that such an argument is not premature, it did not at hearing attempt to present evidence that any 'taking' had in fact occurred. * * * Certainly[,] there is an inadequate factual basis upon which to advance any claim of a constitutional taking."

On February 1, 1993, plaintiff filed this inverse condemnation action in Clatsop County Circuit Court, alleging that the Board's application of its administrative rule constituted a "taking" under Article I, section 18, of the Oregon Constitution, and under the Fifth Amendment to the United States Constitution.[6] (*Boise I*).

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disturbances must be prevented during the critical period of use for nesting. The critical period of use is the time period between March 1 and September 30, each year."

[6] Article I, section 18, of the Oregon Constitution, provides:

> "Private property shall not be taken for public use, nor the particular services of any man be demanded, without just compensation; nor except in the case of the state, without such compensation first assessed and tendered[.]"

On February 22, 1993, after it had filed the present action, plaintiff submitted a plan to log four of the eight acres that the Department previously had agreed could be harvested. On March 8, 1993, the Department approved plaintiff's plan, subject to a condition that the logging not begin until October 1, 1993, and end by March 1, 1994, when no nesting would take place. Plaintiff appealed that temporal restriction to the Board and argued, *inter alia*, that the temporal restriction also constituted a temporary "taking" under the state and federal constitutions.

On March 17, 1993, while its second "takings" claim concerning the four-acre parcel still was pending before the Board, plaintiff petitioned the Court of Appeals for judicial review of the Board's January 15, 1993, order. (*Boise II*).

On April 19, 1993, the Board rejected plaintiff's challenge to the temporal restriction concerning the four acres and entered a second final order. In that order, the Board *did not address* the "takings" issue. Rather, the Board stated that "[t]he issue of whether there is a taking would more properly be [addressed] in a court of competent jurisdiction, once administrative remedies are exhausted."

On April 22, 1993, plaintiff filed a supplemental complaint in the present circuit court action, alleging that the

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The Fifth Amendment to the United States Constitution, provides:

> "No person shall * * * be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Takings Clause of the Fifth Amendment is made applicable to the states through the Due Process Clause of the Fourteenth Amendment. *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 827, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987).

separate temporal restriction on logging the four acres constituted a separate "taking." (*Boise I*).

On April 26, 1993, plaintiff filed a second petition for judicial review, seeking review of the Board's April 19, 1993, order that refused to remove the temporal condition on logging of the four acres. As noted, the Court of Appeals consolidated that proceeding with the earlier administrative review proceeding. (*Boise II*).

In May 1993, the circuit court granted the state's motion to dismiss the entire inverse condemnation claim on the grounds that the court lacked subject matter jurisdiction over the dispute, that the action was not ripe, and that the complaint failed to state a claim. (*Boise I*). Plaintiff appealed the circuit court's ruling to the Court of Appeals, which reversed the dismissal of plaintiff's inverse condemnation claim on all three grounds. The state petitioned for review.[7]

DISCUSSION

I. *Jurisdiction*

The first issue presented is whether, as the state argues, in a regulatory "takings" claim, the agency that promulgated the rule that is alleged to effect a "taking" has primary jurisdiction to determine whether the application of that rule does, in fact, constitute a "taking."[8] The Court of Appeals held that the Board and the circuit court have *concurrent* jurisdiction over plaintiff's

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[7] We reject the state's ripeness arguments for the reasons stated in the Court of Appeals' opinion. *Boise I*, 131 Or.App. at 540 n. 2, 886 P.2d 1033.

[8] The doctrine of "primary" jurisdiction is defined as a doctrine under which, "where the law vests in an administrative agency the power to decide a controversy or treat an issue, the courts will refrain from entertaining the case

"takings" claims, but declined to decide whether the Board has any "decisional authority" initially to decide the "takings" issue. *Boise I*, 131 Or.App. at 546-49, 886 P.2d 1033. The state advances two arguments on review: (1) The Board has "exclusive" jurisdiction, to the exclusion of the circuit court, to decide the "takings" issue; or, (2) alternatively, a regulatory "takings" claim must be resolved, in the first instance, by the agency whose rule is alleged to have effected a "taking," because the agency has "primary jurisdiction" over such claims.

There are two types of "primary" jurisdiction. First, *statutory* primary jurisdiction exists when a statute "specifically requires courts to apply the primary jurisdiction doctrine to a class of disputes." Kenneth Culp Davis and Richard J. Pierce, Jr., II, *Administrative Law Treatise* § 14.1, 276 (3d ed. 1994) (hereafter "Davis and Pierce").[9] Second, by contrast, "[i]n the bulk of cases * * *, primary jurisdiction is a judge-made doctrine. Its scope and effect are determined by judicial reasoning." *Ibid.* There is no statute that addresses the issue before us; the state in this case is asserting the latter type of primary jurisdiction.

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until the agency has fulfilled its statutory obligation." *Black's Law Dictionary* 1190-91 (6th ed. 1990). An even clearer and more comprehensive definition appears in a standard layman's dictionary: "[T]he right or responsibility of an administrative or regulatory agency to pass initially on controversies involving matters of fact or discretion within its sphere before relief is sought in the courts[.]" *Webster's Third New Int'l Dictionary* 1800 (unabridged ed. 1993). "Exclusive" jurisdiction is defined as jurisdiction "to the exclusion of all other [tribunals]." *Black's*, at 564. "Concurrent" jurisdiction means, in this case, that a court and administrative agency share "[a]uthority * * * to deal with the same subject matter." *Id.* at 291.

[9] For example, Professor Davis notes that "Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq., provid[es] for nonjudicial and nonadversary resolution of claims and provid[es] that a complainant in a state or locality with a fair employment commission must first go to that commission with his claim." Davis and Pierce, § 14.1 at 276.

Judicial invocation of the doctrine of primary jurisdiction generally is appropriate when a court decides that an administrative agency, rather than a court of law, initially should determine the outcome of a dispute or one or more issues within that dispute that fall within that agency's statutory authority. The purpose behind the doctrine is the "recognition of the need for orderly and sensible coordination of the work of agencies and of courts." Kenneth Culp Davis, *Administrative Law Text* § 19.01, 374 (3d ed.1972). The reason for the doctrine is "not a belief that an agency's expertise makes it superior to a court; [but] that a court confronted with problems within an agency's areas of specialization should have the advantage of whatever contributions the agency can make to the solutions." *Id.*, § 19.06 at 381. That is, the doctrine is one ordinarily invoked by a court in the traditional judicial system with the belief that a previous agency disposition of one or more issues before the court will assist the court in resolving the case before it.

Courts vary in their approaches to invoking the doctrine of primary jurisdiction. According to one treatise on administrative law, with which we agree:

> "There is no fixed formula for determining whether an agency has primary jurisdiction over a dispute or an issue raised in a dispute. In making such determinations, courts consider several factors, including (1) the extent to which the agency's specialized expertise makes it a preferable forum for resolving the issue, (2) the need for uniform resolution of the issue, and (3) the potential that judicial resolution of the issue will have an adverse impact on the agency's performance of its regulatory responsibilities."

Davis and Pierce, § 14.1 at 272. The authors also observe, however, that, "[i]ncreasingly, * * * courts balance the considerations that favor allocation of initial decisionmaking

responsibility to an agency against the likelihood that application of primary jurisdiction will unduly delay resolution of the dispute before the court." *Ibid.*

Upon invoking the doctrine of primary jurisdiction, the disposition of the case depends on the nature of the parties' dispute and the scope of the agency's authority. If an agency has primary jurisdiction over the entire dispute, the court action is dismissed. However, if an agency has primary jurisdiction over an issue in dispute,

> "the court will defer any decision in the action before it until the agency has addressed the issue that is within its primary jurisdiction. The court retains jurisdiction over the dispute itself and all other issues raised by the dispute, but it cannot resolve that dispute until the agency has resolved the issue that is in its primary jurisdiction."

Davis and Pierce, § 14.1 at 271.

We now turn to the present case. The state argued in the Court of Appeals that the Board has primary jurisdiction over the "takings" claim under *Dunn v. City of Redmond*, 303 Or. 201, 735 P.2d 609 (1987).[10] The Court of Appeals rejected that argument for two reasons. First, the court concluded that Dunn did not hold that circuit courts lack jurisdiction over inverse condemnation claims. Rather, that case concerned the sequence of the Land Use Board of Appeals ("LUBA") and the circuit court's authority to act in some contexts, where both land use and "takings" issues were asserted and intertwined. *Boise I*, 131 Or.App. at 548, 886 P.2d 1033. Second, the Court of Appeals

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[10] The facts and procedural history of *Dunn* are discussed below, 325 Or. at 195, 935 P.2d at 418.

observed that Dunn dealt with LUBA's authority to decide "takings" questions and "did not purport to make a general or abstract allocation of jurisdiction or authority between the circuit courts and all agencies." *Ibid.*

The Court of Appeals also observed that LUBA is an adjudicative agency, while the Board is a regulatory agency, and that "the determination of whether a regulatory action results in a taking of private property is an adjudicative act." *Id.* at 549, 886 P.2d 1033. The court stated:

> "Leaving aside the fox in the henhouse problem with the state's contention that a regulatory agency should have sole original jurisdiction to decide in the same order that imposes a regulation whether the regulation results in a taking, the state's argument is mechanically flawed: The adjudication of whether there has been a regulatory taking will generally be dependent on a showing of facts that cannot even be known at the time that the regulatory decision is made, *e.g.*, the scope of the regulation's impact on a particular landowner's ability to make viable economic use of particular land. Although regulatory agencies obviously may consider whether their prospective actions might result in takings, nothing in *Dunn* or in logic supports the view that they have jurisdiction, to the exclusion of the circuit courts, to decide whether their own consummated regulatory actions have resulted in takings."

Ibid. (footnote omitted).

On review, the state challenges what it describes as the Court of Appeals' "overly narrow" application of *Dunn*. The state concedes that *Dunn* arose in a different context from this case, but argues that the rationale underlying *Dunn* supports the conclusion that the agency has *primary jurisdiction* to resolve a

regulatory "takings" claim in this case.[11] In the state's view, *Dunn* "stands for the proposition that the forum jurisdiction issue requires an examination, first and foremost, of the statutory scheme that the legislature has put into place" and for the proposition that "the legislature may place jurisdiction over takings claims in an administrative venue, and that legislative choice will be respected by the courts."

The state observes that the Board, like other administrative agencies, has authority to consider a complaint that includes constitutional claims. From that fact, the state reasons that the Board has authority to resolve a "takings" claim. According to the state, "[t]he fact that the board has the authority to adjudicate constitutional challenges to its own rule, and that under the APA [Oregon Administrative Procedures Act (ORS chapter 183)] its decisions are subject to full judicial review, should have led the Court of Appeals to conclude that the board has primary, if not exclusive, jurisdiction over the takings challenge." The state also argues, *inter alia*, that an inverse condemnation action in circuit court is duplicative and unnecessary, because administrative proceedings and judicial review of those proceedings adequately protect the constitutional interests at stake.

At the outset, we note that the state's reliance on *Dunn* is misplaced. In *Dunn*, a petitioner sought judicial review of LUBA's determination that two city ordinances did not constitute a "taking" of petitioner's land. The landowner argued that the ordinances allowed the city to "take" property, in violation of the state and federal constitutions. The Court of Appeals did not reach the merits of that claim, because it decided *sua sponte* that

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[11] In the alternative, the state argues that the Court of Appeals should have concluded "that the board has primary, *if not exclusive*, jurisdiction over the takings challenge." (Emphasis added.)

the challenged actions were beyond LUBA's jurisdiction and ordered LUBA to dismiss the proceeding. *Dunn v. City of Redmond*, 82 Or.App. 36, 727 P.2d 145 (1986).

On review, this court noted that "Oregon land use law assigns * * * LUBA 'exclusive jurisdiction' to review a 'land use decision,' including review of its constitutionality. ORS 197.825, 197.835(8)(a)(E)." *Dunn*, 303 Or. at 203, 735 P.2d 609. The court also noted that, under the applicable statutes, LUBA could "reverse or remand" an unconstitutional land use decision. On the other hand, LUBA could not "award compensation when the constitutional claim is that the challenged decision takes private property for public use without just compensation." *Id.* at 204, 735 P.2d 609. The court stated:

> "In sum, if an owner seeks to have a land use decision set aside on constitutional grounds, the owner must take that appeal to LUBA. An owner who maintains that the government's acts entitle him to compensation may seek compensation in circuit court. If the owner seeks invalidation of the land use decision or compensation in the alternative, or both, and the government defends the validity of its regulatory decision and denies that compensation is due, the [circuit] court may have to withhold judgment until the legality of the land use decision is placed before and decided by LUBA and the government has had an opportunity to reconsider and modify its decision."

Id. at 209, 735 P.2d 609. *Dunn* rejected the Court of Appeals' conclusion that "LUBA loses jurisdiction whenever 'a taking claim is asserted,' even if the petition asserts that claim in an effort to invalidate a land use decision rather than to obtain compensation." *Id.* at 208, 735 P.2d 609.

In contrast to *Dunn*, this case does not involve a legislative grant of "exclusive jurisdiction" to an agency such as LUBA to consider plaintiff's claim. Rather, this case involves a circuit court challenge to final orders that the Board had the authority to enter. The alleged *effect* of the final orders was to preclude plaintiff from using its land. In our view, *Dunn* makes it clear that the fact that plaintiff's inverse condemnation claim *stems from* an agency order does not preclude the circuit court from exercising jurisdiction. The issue presented--whether a "taking" occurred--is a constitutional question, and the context within which it is raised, an inverse condemnation action, traditionally falls within an area adjudicated by courts. Therefore, the traditional rationales for primary jurisdiction, such as agency expertise, collateral estoppel, and efficiency either are not applicable or are present only to a diminished degree.

Moreover, in this case, "the special competence of an administrative body" is not required to determine whether the application of OAR 629-24-809 effected a "taking" of plaintiff's land. *Cf.* Kenneth Culp Davis, *Administrative Law* 121 (6th ed. 1977) ("a court should not act upon subject matter that is peculiarly within the agency's specialized field without taking into account what the agency has to offer"). Likewise, other justifications for invoking the doctrine of primary jurisdiction, such as a need for uniform resolution of the legal issue involved or a consideration whether judicial resolution of the issue may adversely impact the agency's performance of its regulatory responsibilities, are not present in this context. Accordingly, it is not appropriate in this case to prevent the circuit court from exercising its jurisdiction over plaintiff's "takings" claim by invoking the doctrine of primary jurisdiction. That being so, we hold that plaintiff's complaint properly was before the circuit court, because the circuit court and the Board share concurrent jurisdiction in this case. It follows that the trial court erred in dismissing the action for lack of subject matter jurisdiction.

II. *"Takings" by inverse condemnation under the Oregon Constitution*

Because this case comes to us on appeal of a judgment of dismissal, we next must determine whether plaintiff's complaint states a claim for relief.[12] For purposes of reviewing a motion to dismiss, we assume the truth of all well-pleaded facts alleged in the complaint and give plaintiff the benefit of all favorable inferences that may be drawn from those facts. *Stringer v. Car Data Systems, Inc.*, 314 Or. 576, 584, 841 P.2d 1183 (1992); *Oksenholt v. Lederle Laboratories*, 294 Or. 213, 215, 656 P.2d 293 (1982). In order to determine whether the complaint states a claim for relief, we first must discern what is required to establish a "takings" claim under Oregon law.[13]

Our decisional law demonstrates that there are at least two different ways in which governmental action may result in a "taking" by inverse condemnation under Article I, section 18, of the Oregon Constitution. The first arises when a present governmental action creates an expectation that the private land in question eventually will be taken for a public use. *See Fifth Avenue Corp. v. Washington Co.*, 282 Or. 591, 613, 581 P.2d 50 (1978) (illustrating concept). In such circumstances, a property owner must prove that the owner is precluded from "all economically feasible private uses [of the property] pending eventual taking for public use" or that "the designation [of the property for eventual public use] results in such governmental intrusion as to inflict virtually irreversible damage." *Id.* at 613-14, 581 P.2d 50.

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[12] We use the term "complaint" to refer to the supplemental complaint on which the parties ultimately proceeded.

[13] This court considers state constitutional claims before considering federal constitutional claims. *State v. Kennedy*, 295 Or. 260, 262, 666 P.2d 1316 (1983); *Sterling v. Cupp*, 290 Or. 611, 614, 625 P.2d 123 (1981).

The second category of "takings" by inverse condemnation occurs when the government acts to "intervene[ ] to straighten out situations in which the citizenry is in conflict over land use or where one person's use of his land is injurious to others." *Fifth Avenue Corp.*, 282 Or. at 613, 581 P.2d 50 (quoting *Fred F. French Inv. Co., Inc. v. City of New York*, 39 N.Y.2d 587, 385 N.Y.S.2d 5, 350 N.E.2d 381, 384-86 (citing Joseph L. Sax, *Takings and the Police Power*, 74 Yale L.J. 36, 62-63 (1964)), *cert. den.* 429 U.S. 990, 97 S.Ct. 515, 50 L.Ed.2d 602 (1976)). To establish a "taking" in the latter context, the test is essentially the same as under the former: The property owner must show that the application of the government's particular choice deprives the owner of *all economically viable use of the property*. *Fifth Avenue Corp.*, 282 Or. at 609, 613, 581 P.2d 50. If the owner has "some substantial beneficial use" of the property remaining, then the owner fails to meet the test. *Dodd v. Hood River County*, 317 Or. 172, 184-86, 855 P.2d 608 (1993).

In this case, plaintiff has alleged in both its claims for relief that the Board's application of OAR 629-24-809 to its proposed logging plans denied plaintiff all economic use of its land.[14] With respect to the first claim for relief, the plaintiff has alleged "depriv[ation] * * * of the only economically viable use of approximately 56 acres of merchantable timber." Assuming

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[14] Plaintiff's complaint outlines the lengthy procedural facts set forth above, which we will not repeat. The complaint also alleges, in part:

> "Plaintiff asserts two claims for inverse condemnation based on the Oregon and U.S. Constitutions. The first claim seeks just compensation for this regulatory taking, *which deprives plaintiff of the only economically viable use of approximately 56 acres of the merchantable timber*. The second claim involves a *temporal restriction prohibiting plaintiff from logging four acres of the unit until after October 1, 1993, which constitutes a temporary taking of plaintiff's timber for a public use*."

the truth of all well-pleaded facts alleged in the complaint and giving plaintiff the benefit of all favorable inferences that may be drawn from those facts, that allegation is sufficient to meet the "deprivation of all economically viable use of the property" standard. The Court of Appeals was correct in so holding.

With respect to the second claim for relief, plaintiff has alleged two things: (1) The "*temporal* restriction prohibiting plaintiff from logging four acres of the unit until after October 1, 1993, * * * constitutes a *temporary* taking of plaintiff's timber for a public use," and (2) "[p]laintiff is *presently* deprived of all economic use of its merchantable timber on the subject four acres." (Emphasis added.) In other words, plaintiff alleges a *temporary* deprivation of all economically viable use of the four acres *during the six-month period* when the temporal restriction was in effect.

Both this court and the United States Supreme Court have recognized that, under certain circumstances, a "temporary" taking of all economic use of a piece of property may constitute a "taking" under the pertinent provisions of the state and federal constitutions. *See Suess Builders v. City of Beaverton*, 294 Or.

"FIRST CLAIM FOR RELIEF

"*The timber, including the two nest trees, on the Walker Creek Unit which plaintiff desires to log has no economic value unless harvested. The Board's action in denying plaintiff the right to log the Walker Creek Unit has denied it of all economic use of that timber. Apart from the subject merchantable timber, the underlying commercial forestland has no separate economic value until the timber has been logged.*"

"SECOND CLAIM FOR RELIEF

"*Plaintiff is presently deprived of all economic use of its merchantable timber on the subject four acres.*"
(Emphasis added.)

254, 263, 656 P.2d 306 (1982) (decided at least in part under Article I, section 18, of the Oregon Constitution; holding that complaint, liberally construed, could be deemed to allege that one or more local governments had "temporarily taken all economic use of the plaintiffs' property"); *First Lutheran Church v. Los Angeles County*, 482 U.S. 304, 318, 107 S.Ct. 2378, 2387, 96 L.Ed.2d 250 (1987) (holding to similar effect under Fifth and Fourteenth Amendments to the United States Constitution). But each of those cases was one in which a government regulation or ordinance that was on its face permanent in character allegedly prevented the owners from making *any* economic use of the property in question. By contrast, the allegations here affirmatively establish that, under the regulations, plaintiff *can* utilize the four acres in question for timber production during part of each calendar year. That is, the regulations appear to be permanent, but their interference with plaintiff's use of its property is not temporally comprehensive.

We think that, in order to distinguish between a "taking," on the one hand, and simple administrative inconvenience or delay, on the other, it is necessary to require that a complaining party allege some degree of permanence in its loss. We hold that, in order to assert a claim for a "temporary taking" under the Oregon Constitution, the complaining party must allege that it has been denied all economic use of its property under a law, ordinance, regulation, or other government action that either is permanent on its face or so long lived as to make any present economic plans for the property impractical. *See Suess Builders*, 294 Or. at 262-63, 656 P.2d 306 (to that effect). Under such a standard, plaintiff's complaint falls short. It alleges only that, during certain months of each year, it will not be permitted to harvest trees on the parcel. By necessary implication, there is nothing in the regulations that would prohibit harvesting during the balance of the year. To be a "taking," governmental action must be made of sterner stuff.

We understand the federal rule, under *First Lutheran*, to be to the same effect. 482 U.S. at 318, 107 S.Ct. at 2387. The Court of Appeals erred in holding that plaintiff had alleged a sufficient claim in its second claim for relief.

The state attempts to avoid the entire "takings" question by relying on *GTE Northwest, Inc. v. Public Utility Commission*, 321 Or. 458, 900 P.2d 495 (1995). The state argues that *GTE* stands for the proposition that express eminent domain authority is the predicate to a compensable "taking." In *GTE*, plaintiff GTE (a telephone local exchange carrier, "LEC") sought review of certain collocation rules adopted by the Public Utility Commission ("PUC").[15] Under the challenged rule, an LEC was required to allow an enhanced services provider ("ESP") to occupy a portion of the LEC's property, for the purpose of placing the ESP's equipment there.

GTE argued that the PUC lacked the statutory authority to promulgate the collocation rules, because the rules allegedly constituted a "taking," in violation of the state and federal constitutions. GTE further argued that, because the PUC lacked the *express* eminent domain authority that is required before an agency may effect a "taking," the collocation rules are beyond the PUC's statutory authority, no matter how much compensation might be paid for actions taken under them. In other words, GTE argued that the PUC lacked authority to engage in acts, including rulemaking, that effect a "taking," because the PUC lacked *express* eminent domain authority to take property for a public purpose.

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[15] "'Collocation' means a service, offered by a[n] LEC, which provides for placement and installation of a customer's equipment, software, and databases on LEC premises. Premises include central offices, remote network facilities, or any other similar location owned by the LEC. The equipment, software, and databases are owned by the customer." *GTE*, 321 Or. at 462, 900 P.2d 495.

This court in *GTE* outlined relevant decisional law and stated:

> "The cases cited above establish a bright-line rule: that an agency may not act in eminent domain without an express grant of power from the legislature. It is up to the legislature, not the PUC or any other administrative agency, to determine how those powers should be exercised. The legislature's reasons for granting or refusing to grant [to] an administrative agency the power to act in eminent domain may include a desire to refrain from depleting the public fisc. However, the legislature's decision may also be rooted in a number of other policy considerations.
>
> "* * * * *
>
> "In summary, the power of eminent domain may be exercised by an agency only if the agency has express statutory authority. The PUC does not have express statutory authority to promulgate rules that would effect a taking of an LEC's facilities."

321 Or. at 467-68, 900 P.2d 495. The *GTE* court then concluded that the collocation rules effected a "taking" under the federal constitution, and struck them down. *Id.* at 477, 900 P.2d 495.

The state relies on that portion of *GTE* that defines the "bright-line" rule concerning express eminent domain authority. That passage from *GTE* is significant, the state argues, because express eminent domain authority "is a key element of an inverse condemnation claim and of the right to seek compensation for a regulatory taking."

The state misreads *GTE*. *GTE* involved a straightforward *eminent domain* action in which the issue was whether the state could "take" certain property and, if so, what compensation was owed to the property owner. Unlike *GTE*, this case involves an *inverse condemnation* action in which plaintiff alleges that the state "took" plaintiff's property when it issued two orders that prevented plaintiff from logging on two separate occasions. The "bright-line" rule set forth in *GTE* applies in the eminent domain context. In contrast, in an inverse condemnation action wherein a plaintiff alleges that a "taking" *has occurred* and the plaintiff seeks damages, *GTE* does *not* require a landowner to prove that an agency has express eminent domain authority as an element to an inverse condemnation action. Rather, the issue in this case is whether the application of OAR 629-24-809 to plaintiff's timber harvest plans *resulted in* a "taking." Plaintiff has alleged that application of the rule in this case *did* result in a taking. *GTE* does not stand for any proposition that would defeat circuit court jurisdiction in such circumstances.

In summary, we conclude that the Board shares concurrent jurisdiction with the circuit court in this case. The Board does not have primary jurisdiction. Consequently, plaintiff's complaint was properly before the circuit court, assuming that it otherwise properly pleaded a claim for relief for inverse condemnation. We hold that it did adequately plead such a claim in its first claim for relief. It did not do so in its second claim for relief.

The decision of the Court of Appeals is affirmed in part and reversed in part. The judgment of the circuit court is affirmed in part and reversed in part, and the case is remanded to that court for proceedings consistent with this opinion.

FILED: November 10, 1999

IN THE COURT OF APPEALS
OF THE STATE OF OREGON

BOISE CASCADE CORPORATION,
a Delaware corporation,

Respondent,

v.

STATE OF OREGON, by and through
the Oregon State Board of Forestry,

Appellant.

(93-2018; CA A100855)

Appeal from Circuit Court, Clatsop County, Paula J. Brownhill, Judge.

John T. Bagg, Assistant Attorney General, attorney for appellant.

Phillip D. Chadsey attorney for respondent.

Daniel Kearns, Reeve Kearns PC, and John D. Echeverria filed a brief *amicus curiae* for Audubon Society of Portland.

Brent D. Boger, Robin L. Rivett, and Eric Grant filed a brief *amicus curiae* for Pacific Legal Foundation, Oregon Farm Bureau, and California Farm Bureau Federation.

Before De Muniz, Presiding Judge, Deits, Chief Judge, and Armstrong, Judge.

DE MUNIZ, P. J.

Reversed and remanded

DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS

Prevailing party: Appellant
[X] Costs allowed, payable by: Respondent

MONEY JUDGMENT

Judgment #1

Creditor:	STATE OF OREGON, by and through the Oregon State Board of Forestry
Debtor:	BOISE CASCADE CORPORATION, a Delaware corporation
Costs:	$3,088.99
Attorney fees:	-0-
TOTAL AMOUNT:	$3,088.99
Interest:	Simple, 9% per annum, from the date of this appellate judgment.

Appellate Judgment
Effective Date: December 15, 2000

COURT OF APPEALS
(seal)

OREGON ADMINISTRATIVE RULES COMPILATION
CHAPTER 629. DEPARTMENT OF FORESTRY
EMERGENCY FIRE COST COMMITTEE
DIVISION 665. SPECIFIED RESOURCE SITE PROTECTION RULES
Current through August 15, 2000

629-665-0210

Interim Requirements for Northern Spotted Owl Nesting Sites

(1) Whenever the State Forester determines that an operation will conflict with protection of a nesting site of the northern spotted owl (Strix occidentalis caurina), the operator must obtain the State Forester's approval of a written plan before commencing the operation. The written plan, at a minimum, must address how the operation will be conducted to provide for the following:

(a) A 70 acre area of suitable spotted owl habitat encompassing the nest site, to be maintained as suitable spotted owl habitat;

(b) Prevention of disturbances resulting from operation activities which caused owls to flush from the nesting site. Such disturbances must be prevented during the critical period of use for nesting. The critical period of use is the time period between March 1 and September 30, each year.

(2) For the purpose of this rule, nesting site means and includes the tree, when known, containing a spotted owl nest; or when not specifically known, includes an activity center of a pair of adult spotted owls. An activity center is a location determined by the State forester to have been reliably identified as being occupied by an adult pair of spotted owls, capable of breeding. Such determination must be supported by repeated observation of the owls in close proximity or observation of nesting behavior.

(3)(a) For the purposes of this rule, suitable spotted owl habitat means and includes:

(A) A stand of trees with moderate to high canopy closure (60 to 80%); a multi-layered, multi-species canopy dominated by large overstory trees (greater than 30 inches in diameter at breast height); a high incidence of large trees with various deformities (e.g., large cavities, broken tops, and other evidence of decadence); numerous large snags; large accumulations of fallen trees and other woody debris on the ground; and sufficient open space below the canopy for owls to fly; or

(B) In the absence of habitat which exhibits all the characteristics listed above, the available forested habitat which comes closest to approximating the listed conditions.

(b) Stands which do not exhibit at least two of the characteristics listed in paragraph (a)(A) of this section are not suitable habitat.

(4) (For information only) Federal law prohibits a person from taking northern spotted owls. Taking under the federal law may include significant alteration of owl habitat on any class of land ownership. Compliance with subsection(1) of this rule is not in lieu of compliance with any federal requirements related to the federal **Endangered Species Act**.

(5) Exceptions to the requirements for protecting northern spotted owl nesting sites may be approved by the State Forester if the operator has obtained an incidental take permit from federal authorities under the federal **Endangered Species Act**.

Stat. Auth.: ORS 527.710
Stats. Implemented: ORS 527.715
Hist.: FB 11-1990(Temp), f. 12-20-89, cert. ef. 12-21-90; FB 5-1991, f. & cert. ef. 6-6-91; FB 9-1996, f. 12-2-96, cert. ef. 1-1-97, Renumbered from 629-024-0809

DEPARTMENT OF FORESTRY

DIVISION 680
RESOURCE SITE INVENTORY AND PROTECTION PROCESS RULES

629-680-0000
Purpose

(1) OAR 629-680-0000 to 0430 shall be known as the Resource Site Inventory and Protection Process Rules.

(2) The purpose of the rules in OAR 629, Division 680 is to set criteria to inventory and protect special resources described in ORS 527.710 (3)(a) on forestlands regulated by the Forest Practices Act. Forests make a vital contribution to Oregon by providing jobs, products, tax base and other social and economic benefits, by helping to maintain forest tree species, soil, air and water resources and by providing a habitat for wildlife and aquatic life. Consistent with ORS 527.630, it is the policy of these rules to encourage economically efficient forest practices that assure the continuous growing and harvesting of forest tree species and the maintenance of forestland for such purposes as the leading use on privately owned land, consistent with sound management of soil, air, water and fish and wildlife resources that assures the continuous benefits of those resources for future generations of Oregonians.

Stat. Auth.: ORS 527.710
Stats. Implemented: ORS 527.715
Hist.: FB 4-1990, f. & cert. ef. 7-25-90; FB 3-1991, f. & cert. ef. 5-23-91; FB 9-1996, f. 12-2-96, cert. ef. 1-1-97, Renumbered from 629-056-0010

OREGON ADMINISTRATIVE RULES COMPILATION
CHAPTER 629. DEPARTMENT OF FORESTRY
EMERGENCY FIRE COST COMMITTEE
DIVISION 680. RESOURCE SITE INVENTORY AND PROTECTION PROCESS RULES
Current through August 15, 2000

629-680-0010
Definitions

In addition to the definitions listed in OAR 629-600-0100, as used in OAR Chapter 629, Division 680:

(1) "Critical period of use" means the time of year the State Forester determines a species is sensitive to disturbance at a resource site.

(2) "Disturbance" means actions which cause birds to flush from the resource site.

(3) "Endangered species" means any fish or wildlife species identified as "endangered" on lists that are adopted, by rule, by the Oregon Fish and Wildlife Commission or are federally listed as "endangered" under the **Endangered Species Act of 1973** as amended.

(4) "Listed species" means a species adopted by the Board under OAR 629-680-0200.

(5) "Site productivity" means the ability of a resource site to produce the benefits for which it is being protected. As an example, nesting site productivity is measured by the number of young birds successfully raised. For a roosting site, productivity is measured by the number of birds roosting over a given time. Watering site productivity is measured by the number of band-tailed pigeons that visit the resource site over a given time.

(6) "Threatened species" means any fish or wildlife species identified as "threatened" on lists that are adopted, by rule, by the Oregon Fish and Wildlife Commission or are federally listed as "threatened" under the **Endangered Species Act of 1973** as amended.

Stat. Auth.: ORS 527.710

Stats. Implemented: ORS 527.715
Hist.: FB 4-1990, f. & cert. ef. 7-25-90; FB 3-1991, f. & cert. ef. 5-23-91; FB 8-1991, f. & cert. ef. 10-30-91; FB 9-1996, f. 12-2-96, cert. ef. 1-1-97, Renumbered from 629-056-0020

OREGON ADMINISTRATIVE RULES COMPILATION
CHAPTER 629. DEPARTMENT OF FORESTRY
EMERGENCY FIRE COST COMMITTEE
DIVISION 680. RESOURCE SITE INVENTORY AND PROTECTION PROCESS RULES
Current through August 15, 2000

629-680-0100

Process for Board Evaluation of Threatened and Endangered Fish and Wildlife Species that use Resource Sites that are Sensitive to Forest Practices

(1) When a species is listed as threatened or endangered by state or federal authorities, the Board shall adopt rules to protect resource sites that are used by those species and that are sensitive to forest practices. The following process shall be used when the Board develops protection rules for these resource sites:

(a) The Board's evaluation shall be based on the best available information summarized in a technical review paper. The paper must be submitted by those proposing protection for resource sites used by a threatened or endangered species. The paper may be written by the State Forester, another agency, an organization or a person. The paper shall demonstrate how the resource sites are sensitive to forest practices. The paper may rely upon information used during the listing process and must:

(A) Identify the resource sites used by the species;

(B) Identify forest practices that conflict with the resource sites;

(C) Evaluate the biological consequences of the identified conflicts; and

(D) Propose protection requirements and exceptions for the resource sites.

(b) The State Forester shall review the technical paper submitted under subsection(1)(a) of this rule. The review shall include an evaluation of the literature used, consultation with technical experts and a technical review by experts chosen by the

State Forester. The State Forester shall submit a report of this review to the Board.

(c) The Board shall review and accept or reject the information presented in subsections(1)(a) and (b) of this rule;

(d) Using the technical review paper and the State Forester's report, plus other available information for the species, the Board shall:

(A) Identify the resource sites for the species;

(B) Identify forest practices that conflict with the resource sites and evaluate the consequences of those conflicts;

(C) Determine the protection requirements for the resource sites; and

(D) Determine any exceptions criteria.

(2) The Board shall adopt protection requirements and exception criteria for resource sites used by the threatened or endangered species.

(3) The State Forester shall maintain an inventory of protected resource sites that are used by threatened or endangered species.

(4) When a threatened or endangered species is de-listed by the Oregon Fish and Wildlife Commission or the U.S. Fish and Wildlife Service, the Board shall determine whether continued protection of resource sites is warranted:

(a) If the Board determines that continued protection rules are warranted, the rules shall be promulgated under the appropriate statutory authority;

(b) If the Board determines that continued protection rules are not warranted, existing rules shall be repealed.

Stat. Auth.: ORS 527.710

Stats. Implemented: ORS 527.715

Hist.: FB 4-1991, f. & cert. ef. 5-23-91; FB 9-1996, f. 12-2-96, cert. ef. 1-1-97, Renumbered from 629-056-0100

OREGON ADMINISTRATIVE RULES COMPILATION
CHAPTER 629. DEPARTMENT OF FORESTRY
EMERGENCY FIRE COST COMMITTEE
DIVISION 680. RESOURCE SITE INVENTORY AND PROTECTION PROCESS RULES
Current through August 15, 2000

629-680-0220
Process for Determining Forest Practices Conflicts and Consequences; Protection Requirements for the Resource Site

(1) The following process shall be used by the Board to evaluate forest practices conflicts and consequences and in setting appropriate protection for the resource site. Using the technical review paper developed in OAR 629-680-0200, plus other available information for each listed species, the Board shall:

(a) Identify the resource site for each listed species;

(b) Identify forest practices that conflict with the resource site and evaluate the consequences of those conflicts;

(c) Determine the protection requirements necessary to protect the resource site;

(d) Determine any exceptions criteria.

(2) The Board shall adopt protection requirements and exception criteria for each species listed in OAR 629-665-0100.

Stat. Auth.: ORS 527.710

Stats. Implemented: ORS 527.715

Hist.: FB 4-1990, f. & cert. ef. 7-25-90; FB 9-1996, f. 12-2-96, cert. ef. 1-1-97, Renumbered from 629-056-0220